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In The

Supreme Court Of The United States

October Term, 1997

SUPERIOR COURT, JUDICIAL DISTRICT
OF HARTFORD / NEW BRITAIN AT HARTFORD,

Petitioner,

v.

KARIN APARO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

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QUESTION PRESENTED

In a case of continuing jeopardy, where the jury at the original trial acquitted the respondent on the charge of accessory to murder and failed to reach a verdict on conspiracy to commit murder, may collateral estoppel be applied to bar retrial of the conspiracy count?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Nature of the Proceedings 4

B. The State's Evidence 6

C. Summary Of The Relevant Lower Court Proceedings 1

1. The state supreme court ruling 15

2. The federal habeas case 17

REASONS FOR GRANTING THE PETITION 18

A. This Court Has Not Decided Whether Collateral Estoppel May Be Applied To Bar The Retrial Of A Mistried Count After The First Trial Ended In Acquittal On One Count and Deadlock On Another, Where Jeopardy Has Not Terminated On the Mistried Count 18

B. If Collateral Estoppel Applies In The Acquittal-Deadlock-Retrial Scenario, It Is Limited To Preclusion Of Evidence Establishing The Ultimate Issue Essential To The Acquitted Count 25

CONCLUSION 28

TABLE OF AUTHORITIES

PAGE

CASES

Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034 (1977) 22

Aparo v. Connecticut, 507 U.S. 972, 113 S.Ct. 1415 (1993) 5

Aparo v. Superior Court, 956 F.Supp. 118 (D. Conn. 1996) 6

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970) ..... passim

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969) 18

Blankenship v. Johnson, 106 F.3d 1202 (5th Cir. 1997) 27

Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 93 S.Ct. 1123 (1973) 26

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977) 24

Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978) 20

Butler v. State, 605 A.2d 186 (Md. Ct. Sp. App. 1992) 21, 26

Connecticut v. Aparo, 507 U.S. 972, 113 S.Ct. 1414 (1993) 5

Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668 (1990) 18, 19

Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963) 23

Drayton v. Hayes, 589 F.2d 117 (2d cir. 1979) 6

Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189 (1932) 24

Flittie v. Solem, 751 F.2d 967 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986) 22

Gilliam v. Foster, 75 F.3d 881 (4th Cir. 1996) 6

Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183 (1971) 22

Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S.Ct. 1805 (1984) 6, 20

Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536 (1984) 24

People v. Goodman, 69 N.Y.2d 32, 511 N.Y.S.2d 565, 503 N.E.2d 996 (1986) 22

Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757 (1970) .. 18, 19

Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984) 19, 20

Standefer v. United States, 447 U.S. 10, 100 S Ct. 1999 (1980) 24

State v. Aparo, 223 Conn. 384, 614 A.2d 401 (1992) 5, 15, 16, 21, 25

Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303 (1982) 26

United States ex rel. Scranton v. New York, 532 F.2d 292 (2d Cir. 1976) 6

United States v. Bailin, 977 F.2d 270 (7th Cir. 1992) 21

United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192 (1896) 19

United States v. Burkitt, 612 F.2d 449 (9th Cir. 1980) 21

United States v. DeVincent, 632 F.2d 155 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981) 23

United States v. Dray, 901 F.2d 1132, (1st Cir. 1990) 21

United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991) 21, 22

United States v. Felix, 503 U.S. 378, 112 S.Ct. 1377 (1992) 16

United States v. Gentile, 816 F.2d 1157 (7th Cir. 1987) 22

United States v. Gonzalez, 548 F.2d 1185 (5th Cir. 1977) 27

United States v. Head, 697 F.2d 1200 (4th Cir. 1982) 21

United States v. Irvin, 787 F.2d 1506 (11th Cir. 1986) 21

United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) 22

United States v. Larkin, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939, 100 S.Ct. 2160 (1980) 20

United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979) 21

United States v. Powell, 469 U.S. 57, 105 S.Ct. 471 (1984) 24

United States v. Sanford, 429 U.S. 14, 97 S.Ct. 20 (1976) 19

United States v. Seijo, 537 F.2d 694 (2d Cir. 1976) 21

United States v. Woods, 484 F.2d 127 (4th Cir. 1973), cert. denied, 415 U.S. 979, 94 S.Ct. 1566 (1974) 22

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) 5, 6, 17, 27

STATUTES

General Statutes § 53a-48 ..... 3, 4

General Statutes § 53a-54a 3, 4

General Statutes § 53a-8 ..... 3, 4

RULES OF COURT

28 U.S.C. §1254 ..... 2, 5, 27

CONSTITUTIONAL PROVISIONS

Amendment V 2

Amendment XIV, Section I 2

MISCELLANEOUS

3 W. LaFave & J. Israel, Criminal Procedure
(1984 ed) 19

In The

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SUPERIOR COURT, JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN at HARTFORD,

Petitioner,

v.

KARIN APARO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The Superior Court for the Judicial District of Hartford/New Britain at Hartford, Connecticut respectfully petitions that a writ of certiorari issue to review the judgment of the Second Circuit

Court of Appeals, entered in this proceeding on July 9, 1997.

OPINION BELOW

The summary affirmance of the Court of Appeals, the opinion of the District Court, and the opinion of the Connecticut Supreme Court are reprinted in the Appendix to this petition at pp. A1 et seq., infra.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in relevant part):

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

Constitution of the United States, Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 53a-8: Criminal liability for acts of another.

A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Connecticut General Statutes Section 53a-48: Conspiracy.

(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

. . . .

Connecticut General Statutes Section 53a-54a(a): Murder.

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception, except that in any prosecution under this subsection, it shall be

an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF THE CASE

A. Nature of the Proceedings

The respondent, Karin Aparo, was arrested following a homicide investigation into the death of her mother, Joyce Aparo. Dennis Coleman, the respondent's boyfriend, confessed to killing Joyce Aparo and implicated the respondent in the crime. She was charged in a two-count information with murder as an accessory, in violation of Connecticut General Statutes §§ 53a-8 and 53a-54a(a); and conspiracy to commit murder, in violation of Connecticut General Statutes §§ 53a-48(a) and 53a-54a(a).

A jury of twelve found the respondent not guilty on the charge of accessory to murder, but was unable to reach a verdict on the conspiracy count. Accordingly, the trial court entered a judgment of acquittal on the accessory charge, and declared a mistrial on the conspiracy count.

Following the state's declaration of its intent to retry the

respondent for conspiracy to commit murder, she filed a motion to dismiss the charge, contending, inter alia, that retrial was barred by principles of double jeopardy and collateral estoppel. The trial court in a written ruling denied the motion to dismiss in its entirety. The trial court held that principles of double jeopardy and collateral estoppel did not bar retrial and did not preclude the state from using any evidence from the first trial at the retrial.

The respondent then appealed to the Connecticut Supreme Court, which affirmed in part and reversed in part the trial court's ruling on the motion to dismiss. State v. Aparo, 223 Conn. 384, 614 A.2d 401 (1992). The state supreme court held that double jeopardy and collateral estoppel did not bar retrial of the conspiracy count, but that collateral estoppel did preclude the state from using certain evidence from the first trial on retrial. Id.

The state and the respondent each filed a petition for certification to this Court. Both petitions were denied. See Connecticut v. Aparo, 507 U.S. 972, 113 S.Ct. 1414 (1993); and Aparo v. Connecticut, 507 U.S. 972, 113 S.Ct. 1415 (1993) [1]

The respondent then filed a federal petition for a writ of habeas corpus in the district court for the District of Connecticut, seeking to bar her retrial.[2] The district court granted the writ, on

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[1] In its first petition, the state argued that this Court had jurisdiction because the Connecticut Supreme Court's decision was a final judgment pursuant to 28 U.S.C. §1257(3), despite the remand for retrial.

[2] In Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), this Court (continued...)

grounds that collateral estoppel completely barred retrial of the conspiracy count. Aparo v. Superior Court, 956 F.Supp. 118 (D. Conn. 1996).

The petitioner appealed to the Court of Appeals, which issued a summary affirmance of the district court's ruling and remanded the case to the Connecticut Superior Court with direction to dismiss the conspiracy count. Aparo v. Superior Court, unpublished order issued July 9, 1997.

B. The State's Evidence

The Connecticut Supreme Court summarized the evidence at the first trial as follows:

> The defendant [Karin Aparo] and [Dennis] Coleman gave contradictory testimony concerning the events leading up to the murder of the defendant's mother, Joyce Aparo. Coleman testified that the defendant, for more than a year preceding the murder, had repeatedly begged him to kill her mother, and that they had planned the murder together in detail the night before he did it. The defendant testified that

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(...continued)
held that a federal court may not enjoin an ongoing state criminal prosecution absent the threat of great and irreparable injury. The Younger rule, known as the abstention doctrine, is not a jurisdictional prerequisite, but a rule of comity.

A colorable double jeopardy claim may provide the ground for a federal court to intervene in ongoing state court proceedings. See Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 304-13, 104 S.Ct. 1805 (1984); Gilliam v. Foster, 75 F.3d 881, 904-05 (4th Cir. 1996)(en banc) (collecting cases); Drayton v. Hayes, 589 F.2d 117, 121 n.7 (2d cir. 1979); United States ex rel. Scranton v. New York, 532 F.2d 292 (2d Cir. 1976).

she had never made any such request, and that she had not known that the murder would take place.

Coleman's testimony was as follows. In 1986 and 1987, the defendant lived with her mother in Glastonbury. In June, 1986, Coleman, then eighteen years old, met and began dating the defendant, who was fifteen years old. During the summer of 1986, the defendant and Coleman began a sexual relationship. At that time, they discussed the defendant's unhappiness with her life at home with her mother, with whom she had a painfully difficult relationship. At first they discussed a plan whereby the defendant would leave her mother and Coleman would become her guardian, but this plan was abandoned when they discovered that the defendant would have to be sixteen years old in order to select her own guardian. The defendant then initiated a discussion with Coleman about killing her mother.

These discussions continued throughout the summer of 1986. At one point, Coleman and the defendant discussed a plan whereby the defendant would stab her mother and claim self-defense. This plan was abandoned when the defendant decided that she could not go through with stabbing her mother herself. They then decided that the defendant would flick the lights of her house as a signal for Coleman, who lived nearby, to come over and kill the victim. The lights did flash, but Coleman did not enter the house.

Coleman's testimony with respect to this incident was supported by a letter written to him by the defendant at that time stating that "[p]romises are very nice but I was taught never to promise anything unless I had an intention of

carrying it out," that "I told you that you wouldn't be able to," that "I didn't ask you this time. You offered," and "Don't promise freedom when you don't have the keys to the cage. It's not fair!" Coleman testified that he had discussed this letter with the defendant and had assured her that he would keep his promise to her.

On a subsequent occasion, while Coleman was visiting the Aparo home, the defendant told him that she was going to put some sleeping pills into a sandwich that she was making for her mother. Coleman did nothing to stop her. Joyce Aparo took one bite of the sandwich, but decided the relish was bad and sent them out to buy new relish.

The evidence included other letters that Coleman and the defendant had written to each other during that summer. In one letter Coleman stated "[a]ny sacrifice I will make," "[s]oon - for you - I will give my soul to something black," and "[y]ou know I would kill for you." The defendant wrote to Coleman: "I will do whatever is necessary. It is a decided thing and I will do it even if you won't help me. It is just another thing to do on my `priority list' & right now it has a very high billing." In the same letter, she also wrote, "[l]eave the logistics to me unless you want to help," and "[m]y God, do you realize what we're thinking?" In the last of the letters from the summer of 1986 that were introduced into evidence, the defendant stated that she knew they could not follow through on their plan. "Being realistic, we both know we could never hurt my mom. I know I couldn't have stood by while someone else did." Thereafter the conversations about killing Joyce Aparo tapered off. The defendant and Coleman continued to see each other on an almost daily basis until the spring of 1987.

In early May, 1987, the defendant began spending the weekends at the Rowayton home of her violin teacher, Albert Markov. When Coleman became upset about the effect of her absences on their relationship, the defendant explained that she was trying to get away from her mother. She also told Coleman that she was in love with Alex Markov, her teacher's son. Later in May, she suggested to Coleman that they should stop communicating for a month, and he agreed. When they next spoke in late June, she told Coleman that she had had sexual relations with Alex Markov, but that her relationship with Markov had become platonic. From July 7 to 14, she traveled with Alex Markov to Woodstock, New York. While there, she spoke with Coleman several times by telephone. He then believed that the defendant's relationship with Alex Markov was platonic, but he was suspicious. Coleman testified that his relationship with the defendant during this time was "stressful."

After the defendant's return from Woodstock, discussion about killing Joyce Aparo resumed. The defendant told Coleman that her mother was forcing her to stay in Rowayton and to continue her relationship with Markov. Toward the end of July, she told Coleman that she, her mother, Albert Markov and Alex Markov would shortly be traveling to Binghamton, New York, for three or four days. Two times during the week before the trip, the defendant spoke to Coleman through her bedroom window. During the first of these conversations, the defendant cried and demanded that her mother be killed soon because she could not stand it anymore. During the second conversation, the defendant said that it had to be done before the trip, because she could not bear the thought of having to go on vacation

with her mother and the Markovs. They then discussed killing Joyce Aparo by holding a rag saturated with bleach and ammonia over her face or by strangling her. They agreed that Coleman would come into the house that night, kill the victim, and carry away the body, and that the defendant would clean up and wipe away fingerprints afterward. Coleman lost his nerve, however, and did not go through with his part of the plan. The next day, shortly before leaving for Binghamton, the defendant telephoned Coleman. At first she was upset that he had not carried out the plan, but then became "more understanding," and told him that she would be home on August 4. She asked him to go to the Aparo home, to let himself in with a key she had previously given him, and to feed her cats, which he agreed to do. They agreed to carry out the murder plan on August 5. During one of the visits to feed the cats, Coleman put a note between the sheets of the defendant's bed stating, "I will do the deed."

On August 4, the defendant, who had returned from Binghamton and was staying in Rowayton, spoke four times by telephone with Coleman. She first told him to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it happened. In the third conversation, the defendant insisted that the body be left where it could be found, so that the victim's life insurance would be paid to the defendant. During the last conversation, Coleman informed the defendant that a friend had agreed to help him.

At 1 a.m. on August 5, Coleman, accompanied by two

friends, entered the Aparo home and strangled Joyce Aparo in her bed with a pair of pantyhose. Coleman and his two friends then took the body away in the victim's car, and abandoned the body and the car in Bernardston, Massachusetts.

Coleman's testimony was supported by that of two friends of the defendant. Shannon DuBois testified that on August 6, the defendant had told her that Coleman had committed the murder. The defendant had told DuBois that she and Coleman had discussed killing her mother on five different occasions, and that they had discussed a number of ways of committing the murder, including the use of chloroform, stabbing her mother, and cutting the brake lines of her mother's car. The defendant had also described the sandwich incident. The defendant said that she had spoken with Coleman the night before the murder, and had not wanted to be there when it happened, but had planned to come back the next day, clean up the house, and call the police. Another friend, Jill Smith, testified that several months after the murder, the defendant had told Smith that Coleman had called her on the night of the murder, that he had been upset that she was not in Glastonbury, and that he had told her he would kill her mother. The defendant had also told Smith that she had not thought that Coleman was serious, because on prior occasions he had said he would kill Joyce Aparo and had not followed through.

The state offered other evidence of actions by the defendant after Joyce Aparo's death that, it claimed, demonstrated her consciousness of guilt. Beverly Warga, an administrative secretary at the police department, testified that on August 5, 1987, she had overheard a telephone

conversation in which the defendant had asked, "Where did you do it? Did you hurt your head? Don't worry about it, I'll be there soon. I'll take care of you." Ann Marie Murray, who had been a coworker of Joyce Aparo's, testified that on August 6, 1987, the defendant had stated that she would be getting $300,000 from an insurance policy. There was evidence that the defendant had concealed evidence and had lied to the police about her knowledge that Coleman had committed the murder, and that she had had sexual relations with Coleman twice after he was arrested. On August 20, 1987, she wrote a letter to Coleman stating, "I really believe that we'll turn out O.K. Even if we both have to spend 25 years in jail."

The defendant, who testified on her own behalf, denied that she had requested or aided Coleman to kill her mother. She testified that her diary entries, which had been admitted into evidence and which stated that "Den & I have our plot" and "Update: Will not carry our plan," referred to her plan with Coleman to run away and get married. She testified that her "priority list" letter had also referred to her plan to run away.

She admitted that there had been a single actual discussion of killing her mother, and that this had led to the flicking of the lights incident. The discussion occurred after her mother had threatened to break up her relationship with Coleman, and she told Coleman that she wished her mother would die. He responded by suggesting that the defendant kill her mother and claim self-defense. When the defendant rejected this suggestion, he offered to do it himself by hiding in the house while they were away. The defendant then said that it would be better for him to be outside the house, and

for her to signal him by flashing the lights. The idea was then dismissed as irrational. Later that day, however, the defendant and her mother did go out, and when they returned her mother accidentally flicked the lights off and on. This frightened the defendant, who locked the door and drew the curtains. The defendant acknowledged that two of her letters to Coleman had referred to this incident. She testified, however, that she had not intended to kill her mother.

The defendant admitted that, after one bitter argument after her mother had found a note discussing the defendant's plan to run away with Coleman, she had crushed two of her mother's Fiorinal tablets and put them in her mother's sandwich. Her intention, however, had been not to kill her mother, but only to calm her down.

After the defendant began spending time with Alex Markov in May, 1987, her relationship with her mother improved. During this same time, her relationship with Coleman began to dissolve, and after she began sleeping with Markov, she suggested to Coleman that they separate for a month so that she could work out her feelings. Several witnesses and her diary entries corroborated her testimony that her relationship with her mother had been improving during this time.

The defendant testified that she had lied to Coleman when she had said that she did not want to go to Binghamton and that her mother was forcing her to do so. She testified, and her diary indicated, that she had been looking forward to the trip and to going to parties with Markov. She had done this because she had not wanted Coleman to think that she "was voluntarily spending time with Alex" and

because she "knew he was jealous."

In the August 4 telephone conversations, the defendant testified, she had not discussed killing her mother at all, but rather had telephoned Coleman to tell him that it would no longer be necessary for him to feed the cats, because her mother had returned home. Coleman had been angry at her mother for making her stay in Rowayton and had said, "Sometimes I just wish I could kill her."

In order to explain certain of her statements and actions, the defendant also presented evidence that she had been physically and emotionally abused by her mother. Numerous witnesses testified about the abuse, and reports were introduced that had been prepared by the Department of Children and Youth Services, which several times had investigated allegations of abuse, and by Norwalk Hospital, which had treated the defendant after a suicide attempt when she was twelve years old. Two psychiatrists, John Cegalis and Walter Borden, testified as expert witnesses on the defendant's behalf. Both opined that she fit the profile of an abused and battered child and suffered from post traumatic stress disorder. Cegalis testified that the defendant's expressions of desire for her mother's death did not indicate an intent to kill, but rather a fantasy that was normal in an abused child. Cegalis also said that the defendant's continuation of her relationship with Coleman, knowing that he had murdered her mother was not abnormal for a battered child, because such children have a "morbid fear" of being rejected or abandoned. In light of her ambivalent feelings about her mother, Cegalis stated that "it would be understandable" for her to with to hold onto, and even to try to protect, the one important person left in her life.

> The defendant also presented evidence that Coleman had acted on his own in order to terminate the defendant's relationship with Markov, which Joyce Aparo had been encouraging. On cross-examination, Coleman admitted that he had been jealous of the defendant's relationships with other men, and that he had been depressed and upset as a consequence of her relationship with Markov. He testified that in late July, 1987, when the defendant asked him what he would do if he knew that she had Markov had had sexual intercourse twenty times, "I told her that if that was true, I would drive off the road and kill us both." He said that on August 3, 1987, while he was in the Aparo home feeding the cats, he had become upset when he saw a pile of photographs of the defendant with Markov. He acknowledged that he had previously stated that he felt that it had been a situation of self-defense, in that it came down to Joyce Aparo or himself.

State v. Aparo, 223 Conn. at 393-401 (footnote omitted).

C. Summary Of The Relevant Lower Court Proceedings

1. The state supreme court ruling

In its opinion, the Connecticut Supreme Court initially determined that collateral estoppel could be applied in this case. State v. Aparo, 223 Conn. 384, 391-92, 614 A.2d 401 (1992). The court then rejected the respondent's argument that, by its verdict of acquittal on the accessory count, the jury had necessarily decided the element of intent to kill (an element of both the

accessory and conspiracy counts) in the respondent's favor. [3] The court reasoned that the jury, in acquitting the respondent of accessorial liability for the murder, could have had a reasonable doubt on the conduct element of accessory to murder, i.e., whether she encouraged or intentionally aided Coleman in committing the murder. Id. at 403-404. However, because encouraging or aiding in a murder is not an element of conspiracy to commit murder, collateral estoppel did not bar retrial of the conspiracy charge. Id. at 404.

The state supreme court then considered the respondent's alternate claim that collateral estoppel required that some of the state's evidence from the first trial be excluded from a second trial. The Connecticut Supreme Court agreed that "the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy." Id. at 409. The court held that on retrial the state could not use certain aspects of Coleman's testimony which the court concluded had necessarily been rejected by the jury. Id. at 410. Because the state had offered evidence of the respondent's intent to kill at times other than during the alleged (and acquitted) accessorial conduct, however, a retrial could go forward without the excluded evidence.

The state supreme court then remanded the case to the trial court for a retrial and for a determination of whether, in addition

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[3] Under Connecticut law, accessory to murder and conspiracy to commit murder are not the same offense. State v. Aparo, 223 Conn. at 401-2; Appendix To Petition. See United States v. Felix, 503 U.S. 378, 112 S.Ct. 1377 (1992) (conspiracy to commit a crime is separate offense from crime itself).

to the portion of Coleman's testimony it specifically ruled inadmissible, other evidence proffered by the state should be excluded from retrial. Id. at 410-11.

2. The federal habeas case

In her federal habeas petition, the respondent sought to bar her retrial on the conspiracy count. She argued that the jury, in finding her not guilty as an accessory to murder, necessarily found the element of intent to kill in her favor, and because such intent is also an element of the conspiracy charge, the federal constitutional principle of collateral estoppel wholly precluded retrial of the conspiracy charge.

The district court performed its own review of the trial evidence and concluded that the jury had decided that the respondent lacked the intent to kill when it acquitted her of being an accessory to her mother's murder. In reaching its conclusion, the district court did not allude to the Connecticut Supreme Court's contrary decision or to the state's arguments for deference and constraint in light of Younger v. Harris, see footnote 2, supra. The district court then granted the writ barring retrial of the conspiracy count.

The petitioner then appealed to the Court of Appeals for the Second Circuit, which issued a summary order affirming the district court's granting of the writ. See Appendix to Petition.

REASONS FOR GRANTING THE PETITION

A. This Court Has Not Decided Whether Collateral Estoppel May Be Applied To Bar The Retrial Of A Mistried Count After The First Trial Ended In Acquittal On One Count and Deadlock On Another, Where Jeopardy Has Not Terminated On the Mistried Count

Collateral estoppel in the criminal law context is embodied in the constitutional protection against double jeopardy. [4] Collateral estoppel operates after an acquittal to prevent the state in a subsequent prosecution from relitigating issues of ultimate fact decided by the acquittal. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970).[5] The burden of establishing that collateral estoppel applies is on the criminal defendant asserting the right. Dowling v. United States, 493 U.S. 342, 350, 110 S.Ct. 668 (1990).

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[4] The double jeopardy clause of the fifth amendment to the United States constitution provides that no individual shall "be subject for the same offence to be twice put in jeopardy of life or limb," and affords protection from repeated prosecutions for the same crime. Price v. Georgia, 398 U.S. 323, 326, 90 S.Ct. 1757 (1970). The double jeopardy provision is applicable through the fourteenth amendment to individuals prosecuted in state courts. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056 (1969).

[5] In Ashe, the defendant was charged with participating in the robbery of several participants in a poker game. After a trial in which the only contested issue was the identity of the defendant as one of the robbers, the jury acquitted the defendant of robbery. Thereafter the state sought to prosecute the defendant for the robbery of another person in the same poker game. This Court held that collateral estoppel entirely barred the subsequent prosecution where the state sought to reli tigate the same legal issue, i.e., the identity of the perpetrator, which was necessarily decided in the defendant's favor in the first prosecution. Ashe v. Swenson, 397 U.S. at 445.

The important issue in this case is whether collateral estoppel is applicable at all in the continuing jeopardy context, where the state initially joined two offenses in one charging document, but the jury deliberations resulted in an acquittal on one count and a deadlock/mistrial on the other. This Court has never considered the application or limitation of collateral estoppel in the context of an acquittal-deadlock-retrial scenario.

This Court's collateral estoppel cases have concerned successive prosecutions, as opposed to retrial after a mistrial. See, e. g., Dowling v. United States, supra; Ashe v. Swenson, supra. In the successive prosecution scenario, there is no question that jeopardy has terminated at the end of the first trial, a final judgment has entered on the charge(s) from the first trial, and the second trial will involve new and/or different charges. Dowling v. United States, supra; Ashe v. Swenson, supra.

Retrial after deadlock/mistrial, however, is a continuing jeopardy situation that does not implicate double jeopardy concerns. Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984); United States v. Sanford, 429 U.S. 14, 97 S.Ct. 20 (1976); see 3 W. LaFave & J. Israel, Criminal Procedure, p. 75 (1984 ed).[6] The concept of continuing jeopardy "applies where

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[6] In Richardson, this Court held that double jeopardy did not preclude retrial where the first trial had ended in had resulted in a mistrial, this Court held that double jeopardy did not preclude retrial, because jeopardy on the mistried count had not yet terminated. In Sanford, where a jury deadlock an acquittal on one count and a mistrial on another count. See Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757 (1970) (despite acquittal on greater offense, jeopardy continues on lesser offense which had been reversed on appeal); United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192 (1896) (double

(continued...)

criminal proceedings against an accused have not run their full course." Justices of Boston Municipal Court v. Lydon, 466 U.S. at 308. Double jeopardy protection is implicated only where there has been some event, such as an acquittal or conviction, which terminates the original jeopardy. Id. A hung jury is not the equivalent of an acquittal. Richardson v. United States, 468 U.S. at 325.

Despite the continuing jeopardy principle, the Court of Appeals, by summarily affirming the district court in the present case, has permitted the respondent to avoid continued prosecution entirely by asserting a collateral estoppel bar. This use of collateral estoppel to bar retrial where jeopardy continues affords the incorporated aspect of double jeopardy an independent and greater force than its constitutional parent.

One other circuit court had initially applied collateral estoppel in the acquittal-deadlock context to bar retrial. In United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979), where the jury had deadlocked on conspiracy and acquitted on vicarious liability, the court recognized that continuing jeopardy existed, but nevertheless believed that Ashe applied to bar retrial. Id. at 1369. On rehearing, however, the court reconsidered its holding, and instead held that the defendant could be retried on the conspiracy charge, but with certain restrictions on the government's proof at the retrial. United States v. Larkin, 611 F.2d 585

(...continued)
jeopardy does not preclude retrial of defendant for same offense after conviction was reversed on appeal). Cf. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978)(exception where reversal on appeal was for insufficient evidence).

(5th Cir.), cert. denied, 446 U.S. 939, 100 S.Ct. 2160 (1980). Cf. United States v. Dray, 901 F.2d 1132, 1136 (1st Cir. 1990) (noting in dicta that collateral estoppel might in some cases foreclose retrial).

A few federal and state courts have indicated that collateral estoppel may be limited to successive prosecutions and thus has no application in the continuing jeopardy context. See, e.g., United States v. Farmer, 923 F.2d 1557, 1563 n. 12 (11th Cir. 1991) (questioning whether collateral estoppel doctrine is limited to successive prosecutions); Butler v. State, 605 A.2d 186, 202 n.13 (Md. Ct. Sp. App. 1992) ("serious doubt" whether collateral estoppel applies to retrial following acquittal-deadlock); see also United States v. Seijo, 537 F.2d 694, 699 (2d Cir. 1976)(declining to consider whether collateral estoppel applies to retrial). Other courts have considered the holding of Ashe to be limited to its facts, i.e., the relitigation of an ultimate issue of fact in a subsequent prosecution. See, e.g., United States v. Head, 697 F.2d 1200, 1205 (4th Cir. 1982).

Some courts (including the state supreme court in this case) have applied collateral estoppel in the acquittal-deadlock scenario to preclude the government's reuse of certain evidence at the retrial of the deadlocked count. See, e. g., United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979); United States v. Bailin, 977 F.2d 270, 276-77 (7th Cir. 1992) (citing cases); State v. Aparo, supra.[7] These cases apply the principles of Ashe v.

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[7] Other courts have held that collateral estoppel is inapplicable where it is not possible to discern the specific facts found on an acquittal. United States v. Irvin, 787 F.2d 1506 (11th Cir. 1986); United States v. (continued...)

Swenson, where jeopardy had terminated, to the acquittal-deadlock situation, without adequate consideration of the continuing jeopardy principle.

Other courts have not precluded the reuse of evidence from the first trial if it was submitted for different purposes on each count of a multi count indictment. See United States v. Farmer, 923 F.2d at 1564 (use of same evidence on accessory and conspiracy counts was immaterial); United States v. Gentile, 816 F.2d 1157, 1162 (7th Cir. 1987) (no bar to retrial where evidence sub-mitted for dual purpose); United States v. Kimberlin, 805 F.2d 210, 232 (7th Cir. 1986) (retrial permissible despite overlap of evidence). See also Flittie v. Solem, 751 F.2d 967, 972 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986) (permitting reuse of evidentiary, as opposed to ultimate, facts); United States v. Woods, 484 F.2d 127, 137-38 (4th Cir. 1973), cert. denied, 415 U.S. 979, 94 S.Ct. 1566 (1974) (same).

In the present case the district court, and the Court of Appeals by its summary affirmance, erroneously expanded the collateral estoppel principle to bar retrial outside the successive prosecution context. See Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183 (1971) (collateral estoppel protects defendant against subsequent prosecution). The collateral estoppel doctrine is not implicated by proof-limiting claims alone, which are not constitutional in nature. See Abney v. United States, 431 U.S. 651, 659, 97 S.Ct. 2034 (1977) (contrasting double jeopardy and

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(...continued)
Burkitt, 612 F.2d 449, 452-53 (9th Cir. 1980); People v. Goodman, 69 N.Y.2d 32, 511 N.Y.S.2d 565, 503 N.E.2d 996 (1986).

evidence suppression rulings); United States v. DeVincent, 632 F.2d 155, 160-61 (1st Cir. 1980) (recognizing distinction between proof-limiting and constitutional collateral estoppel), cert. denied, 450 U.S. 984 (1981). Thus the respondent's proof-limiting claim in the continuing jeopardy context should not have been the basis for federal habeas review.

The acquittal-deadlock-retrial context lacks the inherent oppressiveness and unfairness that double jeopardy and collateral estoppel traditionally protect against. If Ashe establishes a preference for joinder in the first instance of all related charges, that goal was met here. If the principle of collateral estoppel discourages overeager prosecutors from serial prosecutions seeking multiple convictions from the same transaction, that consideration is not implicated. Nor is this a case in which the prosecution covertly sought a mistrial for the chance to strengthen its case. See Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963). In the acquittal-deadlock context that occurred in this case, there is simply no legal or logical reason for the overly broad application of collateral estoppel to bar retrial.

Moreover, considerations inherent in the criminal process weigh against expanding the application of collateral estoppel to the continuing jeopardy situation. These considerations include the state's compelling interest in the enforcement of its criminal laws, and the public's interest in the accuracy and justice of the results in criminal trials.

Where the second trial is necessitated by jury deadlock, a neutral occurrence, and not by prosecutorial abuse or manipula-

tion, a criminal defendant should not be able to assert collateral estoppel to bar retrial any more than he or she would be able to assert a double jeopardy bar. Even if the state should bear the consequences where it has chosen a strategy of successive prosecutions, collateral estoppel should not apply where the state tried both counts simultaneously and where jeopardy continues from the first trial. Indeed, in Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536 (1984), this Court said, "[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." 467 U.S. at 500 n.9. Cf. Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977) (where state could have, but did not, try greater and lesser offenses in single proceeding, double jeopardy precludes subsequent trial on greater offense). Therefore the federal habeas court should not have applied collateral estoppel to bar retrial.

Furthermore, because the acquittal-deadlock situation is analogous to inconsistent verdicts, collateral estoppel should have no effect. The law tolerates inconsistent verdicts, despite the possibility that the jury may have usurped authority or that it may have acted with leniency despite believing the defendant guilty. United States v. Powell, 469 U.S. 57, 105 S.Ct. 471 (1984); Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189 (1932). The principle of collateral estoppel, which is predicated on the assumption that the jury acted rationally, has no application to the inconsistent verdict situation. United States v. Powell, 469 U.S. at 68; Standefer v. United States, 447 U.S. 10, 23 n.17, 100 S.Ct. 1999 (1980).

This Court should grant the petition to consider whether

collateral estoppel applies in the continuing jeopardy context.

B. If Collateral Estoppel Applies In The Acquittal-Deadlock-Retrial Scenario, It Is Limited To Preclusion Of Evidence Establishing The Ultimate Issue Essential To The Acquitted Count

The inquiry into what the respondent's jury actually determined is necessarily fact-bound, and it required a painstaking review of all of the record. Here the state trial court, in denying the motion to dismiss, performed a careful analysis of the evidence at the first trial, and the Connecticut Supreme Court, in reviewing that ruling, did the same. 223 Conn. at 393-401; Appendix To Petition. Both state courts held that the respondent had failed to meet her burden to show that collateral estoppel wholly precluded relitigation of the issue of her intent. Both state courts reached the conclusion that the jury, in acquitting the respondent of accessory to murder, did not necessarily find the element of intent in the respondent's favor, as opposed to her alleged accessorial conduct.

The Connecticut Supreme Court rejected the respondent's claim that the jury necessarily disbelieved all of the state's evidence about her activities and state of mind. "On the contrary, the jury could have reached the result it did if it believed every piece of that evidence except those parts of Coleman's testimony that directly indicated that the defendant had solicited, requested, commanded, importuned or intentionally aided him in the murder of Joyce Aparo." State v. Aparo, 223 Conn. at 405; see id. at 411 (mere knowledge that crime is to be committed not sufficient to establish accessorial liability). The state supreme

court held that collateral estoppel did not preclude all evidence of petitioner's intent to kill at retrial, but only certain evidence that was intricately bound up in the accessory charge. Id. at 405-6, 409-10.

If collateral estoppel may be applied at all in the acquittal-deadlock-retrial scenario, cf. Section A, supra; the state supreme court performed a reasonable and proper application of it. The respondent contested both elements of the accessorial count on which she was acquitted, and the state supreme court reasonably concluded that she failed to demonstrate that the jury necessarily based its acquittal on the intent element. The state court properly concluded that, while the acquittal resolved the question of the respondent's accessorial conduct in her favor, it did not necessarily resolve the issues of her intent and conspiratorial conduct. If the jury in acquitting the respondent on the murder count had unanimously agreed that she lacked the specific intent to kill, they would have acquitted her not only of the accessory charge, but also of conspiracy to commit murder. See Butler v. State, 605 A.2d at 202 (fact that jury hung on some counts attests to lack of factual determination on ultimate issue). The federal court should have recognized that, since some jurors voted for conviction on the deadlocked conspiracy count, they certainly believed that the respondent possessed the requisite intent to kill her mother.

It is not the function of federal habeas corpus proceedings to provide a more favorable forum for evidentiary review. Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303 (1982); see Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 489, 93 S.Ct. 1123 (1973). The federal courts in the present case were wholly indif-

ferent to the process employed by the Connecticut Supreme Court in reaching its conclusions, which was based on federal constitutional principles, elements of the state's criminal laws, and solid evidentiary support. The state supreme court performed a good faith application of federal constitutional law in finding that the jury, by acquitting the respondent of murder, did not necessarily decide the intent element of the deadlocked conspiracy count in her favor. That finding was entitled to deference. 28 U.S.C. 2254(d). See Blankenship v. Johnson, 106 F.3d 1202 (5th Cir. 1997) (where reasonable jurists could differ, no clearly established application of law); United States v. Gonzalez, 548 F.2d 1185, 1192 (5th Cir. 1977) (where more than one possible reason exists for outcome, doctrine of collateral estoppel is inapplicable). Instead, the district court, affirmed by the Court of Appeals, overemphasized the significance of the acquittal and gave the respondent a pretrial review of the quantum of evidence against her.

The federal review also failed to adhere to the constraints engendered by the procedural posture of this case. In the pretrial context, Younger v. Harris, supra, raises a strong presumption against federal intervention in ongoing state court proceedings. See footnote 2, supra. The evil sought to be remedied by the intervention in Younger was prosecutorial abuse of power, bad faith or harassment of the defendant. Younger v. Harris, 401 U.S. at 47-53. The record in the instant case contains no hint that any such abuse or misuse of the prosecutorial function occurred.

Neither the district court nor the Court of Appeals concluded that the state supreme court had misapplied federal Supreme

Court law, or that it had made an unreasonable determination of the facts. Therefore the granting of habeas relief amounted to a draconian interference with state court proceedings and is inconsistent with principles of comity that the federal courts owe state courts. The writ of habeas corpus should have been denied.

CONCLUSION

The writ of certiorari should be granted to address these important issues.

Respectfully submitted,

SUPERIOR COURT, JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD,
Petitioner.

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No. _____

In The

Supreme Court Of The United States

October Term, 1997

SUPERIOR COURT, JUDICIAL DISTRICT
OF HARTFORD / NEW BRITAIN AT HARTFORD,

Petitioner,

v.

KARIN APARO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

United States Court of Appeals for the
Second Circuit - Summary Order . . . . . A-1 to A-3

United States Disctrict Court Ruling. . . . . A-4 to A-27

State of Connecticut Supreme Court Ruling. . . . . A-28 to A-55

DCCT at Waterbury (stamped Rec'd 6/23/97)
93-cv-579
Daly, D.J.

UNITED STATES OF COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

This summary order will not be published in the federal reporter and may not be cited as precedential authority to this or any other court, but may be called to the attention of this or any other court in a subsequent stage of this case, in a related case, or in any case for purposes of collateral estoppel or res judicata.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of June, one thousand nine hundred and ninety-seven.

Present: HONORABLE RICHARD J. CARDAMONE,
HONORABLE RALPH K. WINTER,
HONORABLE JOSE A. CABRANES,
Circuit Judges-

KARIN APARO,
Petitioner-Appellee,

v. No. 96-2591

SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD,
Respondent-Appellant.

Appearing for Appellant: Judith Rossi, Assistant State's Attorney, Office of the Chief State's Attorney, Rocky Hill, Connecticut.

Appearing for Appellee: Hope C. Seeley, Santos & Sealey, Hartford, Connecticut.

Appeal from the United States District Court for the District of Connecticut (Daly, Judge).

This cause came to be heard on the transcript of record from the United States District Court for the District Connecticut and was argued.

On consideration whereof, it is hereby ordered, adjudged and decreed that the judgment of the District Court is hereby affirmed.

This appeal is from Judge Daly's grant of a habeas corpus petition barring the state from retrying Karin Aparo for conspiring to murder her mother. In 1987, Aparo was charged with one count of murder as an accessory and one count of conspiracy to murder, charges that arose from the killing of Aparo's mother by Aparo's boyfriend, Dennis Coleman. A jury acquitted Aparo of murder as an accessory, but was unable to reach a verdict on the conspiracy charge. The state trial court declared a mistrial on the conspiracy count and denied Aparo's motion to dismiss the conspiracy count on double jeopardy grounds. Following an interlocutory appeal to the Connecticut Supreme Court, which held that the state could retry Aparo for conspiracy but could not use certain evidence in the second trial, State v. Aparo, 223 Conn. 384 (1992), Aparo filed the instant petition seeking to completely bar retrial of the conspiracy count. The district court granted the petition.

We affirm for substantially the reasons stated by Judge Daly in Section I.A. of his opinion, Aparo v. Superior Court, 956 F.Supp. 118 (D.Conn. 1996).

/s/ Hon. Richard J. Cardamone, U.S.C.J.

/s/ Hon. Ralph K. Winter, U.S.C.J.

/s/ Hon. Jose A. Cabranes, U.S.C.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KARIN APARO,
Petitioner,

v. : **Civ. No. 3:93CV00579(TFGD)**

SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD,
Respondent.

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Karin Aparo ("petitioner"), seeks a Writ of Habeas Corpus to bar the State of Connecticut Superior Court ("respondent") from subjecting her to a retrial on a charge of conspiracy to commit murder in the death of her mother, Joyce Aparo ("the petitioner's mother"). For the reasons set forth below, the petition is granted.

PROCEDURAL HISTORY

On August 28, 1987, the petitioner was arrested and charged in a short form information with the crimes of murder and conspiracy to commit murder in connection with the death of her mother on August 5, 1987. On September 29, 1987, the State of Connecticut (the "State") filed a two-count long-form information charging the petitioner with murder as an accessory in violation to commit murder in the first degree in violation of Connecticut General Statutes §§ 53a-8 and 53a-54a(a) and with conspiracy to commit murder in the first degree in violation of

Connecticut General Statutes §§ 53a-48(a) and 53a-54a(a). The petitioner pleaded not guilty to both counts.

Prior to trial, on February 19, 1988, the petitioner moved to sever the two counts on the ground that, pursuant to Conn. Gen. Stat. §54-82b(c), she was entitled to be tried by a jury of six on the conspiracy charge. On April 27, 1990, the trial court denied the petitioner's motion to sever. On June 28, 1990, the jury acquitted the petitioner on the charge of murder as an accessory, but was deadlocked, by a seven to five vote in favor of acquittal, on the charge of conspiracy to commit murder. The trial court, in accordance with Connecticut Practice Book §866, declared a mistrial. Thereafter, on July 3, 1990, the petitioner filed a Motion for Acquittal and a Motion in Arrest of Judgment. On February 8, 1991, at oral argument on the motions before the trial court, the parties agreed that the only issue to be decided by the court was the sufficiency of the evidence claim, which was denied by the court in a ruling from the bench. Additionally, by agreement of the parties, the Motion in Arrest of Judgment and the issues relating to double jeopardy and collateral estoppel advanced in the Motion in Arrest of Judgment would be raised before the trial judge at such time as the petitioner was retried on the charge of conspiracy to commit murder.

On July 18, 1990, the State issued a declaration of its intent to retry the petitioner on the charge of conspiracy to commit murder. On May 3, 1991, the petitioner filed a Motion to Dismiss the reprosecution. On November 20, 1991, the trial court denied the motion.

Thereafter, the petitioner filed an interlocutory appeal of the denial of the motion to dismiss in the Connecticut Appellate Court. Subsequently, the Connecticut Supreme Court transferred the matter to its docket. The petitioner presented three arguments

before the Supreme Court: 1) that principles of double jeopardy precluded retrial when six out of twelve jurors voted for acquittal; 2) that principles of collateral estoppel/double jeopardy precluded retrial because the jury necessarily found that she had never intended that her mother be killed; and 3) that principles of collateral estoppel require the exclusion of certain evidence, leaving insufficient admissible evidence to warrant a retrial. See State v. Aparo, 223 Conn. 384, 386-87 (1992). The Supreme Court rejected the first and second claims and accepted the third in part. Id. at 387. The Supreme Court principally held that double jeopardy and collateral estoppel did not bar a retrial but that collateral estoppel did preclude the reuse of certain evidence at the retrial. Both the petitioner and the State filed motions for reargument and reconsideration, which were denied, as were the State's petition and the petitioner's cross-petition for certiorari to the United States Supreme Court. See Connecticut v. Aparo, 113 S.Ct. 1414 (1993) and Aparo v. Connecticut, 113 S.Ct. 1415 (1993). The petitioner subsequently filed the instant petition for a writ of habeas corpus.

DISCUSSION

The petition raises two grounds for relief: 1) that the principles of collateral estoppel/double jeopardy bar the petitioner's retrial on the conspiracy to commit murder charge because the jury, by its acquittal on the accessory to commit murder charge, necessarily determined an essential element of the crime of conspiracy to commit murder in her favor; and 2) that the principles of double jeopardy and due process bar her retrial on the conspiracy to commit murder charge because the petitioner obtained the necessary number of votes for acquittal at the first trial.

As an initial matter, the State raises two arguments that it

asserts bar this Court from considering the instant petition, or parts thereof. First, the State claims that because the petition contains both exhausted and unexhausted claims, the entire petition must be dismissed under Rose v. Lundy, 455 U.S. 509 (1982). Specifically, the State urges that because the Connecticut Supreme Court reviewed only the double jeopardy/collateral estoppel claims in its opinion disposing of the petitioner's appeal, the petitioner still has an avenue of appeal in the state court on her due process claim and, thus, that claim is not exhausted. This assertion is without merit.

The exhaustion doctrine is designed to give state courts a meaningful opportunity to consider claims of error without interference by the federal courts. Vasquez v. Hillery, 474 U.S. 254, 257 (1986)(citing Rose v. Lundy, 455 U.S. 509, 515 (1982)). "Under standards established by [the Supreme Court], a state prisoner may initiate a federal habeas petition '[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated.... It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." Id. (Emphasis added). In the petitioner's brief on appeal before the Connecticut Supreme Court, she specifically raised the due process claim concerning the number of votes necessary for acquittal on the conspiracy charge. See Petitioner's March 5, 1992 Brief to the Connecticut Supreme Court, at 47-48. The mere fact that the state court decided, for whatever reason, not to pass on a federal constitutional issue in its written opinion is not determinative of whether the exhaustion doctrine has been satisfied. See Smith v. Digmon, 434 U.S. 332, 333-34 (1978)("[W]hether the exhaustion requirement ... has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a

federal constitutional claim squarely raised in petitioner's brief in the state court."). Here, the claim was presented to the Connecticut Supreme Court and it had the first crack at reviewing it. Simply because that court did not refer to the due process aspect of that claim in its opinion does not defeat the instant petition. Thus, the exhaustion requirement has been satisfied.

The State next argues that the petitioner failed to raise her claim that the jury necessarily decided that she lacked the intent to agree with Coleman and that this claim should not be reviewed because it is barred by the cause and prejudice standard enunciated by the Supreme Court in Wainwright v. Sakes, 433 U.S. 72 (1977). This argument also is without merit. A review of the record on appeal before the Connecticut Supreme Court clearly establishes that this point was briefed by both parties. See State's April 29, 1992 Brief to the Connecticut Supreme Court, at 29-30; see also Petitioner's May 19, 1992 Reply Brief to the Connecticut Supreme Court, at 11. Accordingly, the Court will consider this claim as well.

I. COLLATERAL ESTOPPEL/DOUBLE JEOPARDY

The petitioner first claims that the principles of collateral estoppel/double jeopardy bar her retrial on the conspiracy to commit murder charge because the jury, by its acquittal on the accessory to commit murder charge, necessarily determined an essential element of the crime of conspiracy to commit murder in her favor. Specifically, the petitioner argues that the jury, by its acquittal on the accessory to commit murder charge, necessarily found either that she lacked the specific intent that her mother be murdered or that, in view of the trial court's assertedly improper instructions to the jury on the accessory charge, she did not "join" in conspiracy with Coleman in the

commission of the murder. The Court will address these arguments seriatim.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." In Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court held that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel in criminal proceedings. See also Dowling v. United States, 493 U.S. 342, 347 (1990). "Collateral estoppel, or, in modern usage, issue preclusion, 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" Ashe, 397 U.S. at 443. "Collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" Id. at 444 (quoting Sealfon v. United States, 332 U.S. 575, 579 1948)); see also United States v. Clark, 613 F.2d 391, 400 (2d Cir. 1979), cert. denied, 449 U.S. 820 (1980). The defendant bears the burden to persuade the court that the issue she seeks to foreclose was "necessarily decided in [her] favor by the prior verdict." United States v. Citron, 853 F.2d 1055, 1058 (2d Cir. 1988). The Second Circuit has previously

noted that "[s]ince it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case, it is a rare situation in which the collateral estoppel defense will be available to a defendant." United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). The Second Circuit also has noted, however, that although the ground of the acquittal generally cannot be ascertained, "the court should avoid making the defendant's burden overly difficult by staining to postulate 'hypertechnical and unrealistic' grounds on which the jury could conceivably have rested its conclusions." United States v. Citron, 853 F.2d at 1058. Further, "[l]imited ambiguity that exists in a jury verdict should be resolved, in accordance with the protections of the Double Jeopardy Clause, in favor of the defendant." United States v. Hans, 548 F.Supp. 1119, 1126 (S.D. Ohio 1982). It is with these standards in mind that the Court addresses the petitioner's claims.

In order to have convicted the petitioner on the charge of accessory to commit murder, the State would had to have proved beyond a reasonable doubt, first, that the petitioner had the specific intent that her mother be killed and, second, that the petitioner solicited, requested, importuned, intentionally aided or, as the trial court instructed, joined with Coleman to cause the death of her mother. See Conn. Gen. Stat. §53a-8. Thus in order to acquit the petitioner on that count the jury had to find either that she did not have the specific intent that her mother be murdered, or that she did not solicit, request, importune, intentionally aid or join Coleman in the commission of the murder, or both.

In order to convict the petitioner of the crime of conspiracy to commit murder, the State must show "that an agreement was

made between two or more persons 'to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators.'" State v. Beccia, 199 Conn. 1, 3, 505 A.2d 683 (1986). Conspiracy is a specific intent crime and intent is further divided into two elements. These are, first, the intent to agree and, second, the intent to commit the offense that is the object of the conspiracy. Id. at 3-4.

Therefore, by statute the only element common to both the accessory to commit murder charge and the conspiracy to commit murder charge is the intent that the petitioner's mother be killed. The petitioner, therefore, has the burden of persuading the Court that the jury, in acquitting her on the accessory to commit murder charge, necessarily determined that she did not have the intent that her mother be killed.

In support of her contention that principles of double jeopardy and collateral estoppel bar her retrial on the conspiracy to commit murder count, the petitioner advances two arguments. First, because she admitted that she performed the acts that constitute the actus reus element, the jury necessarily determined that she did not have the specific intent to commit murder. Second, the petitioner claims that, even if the Court concludes that the jury could have found that she had the specific intent to cause her mother's murder, by adding a third element to the accessory charge, specifically, the word "join," the trial court collapsed the conspiracy charge into the accessory charge.

A. Specific Intent

In order to address the petitioner's claim that the jury by its acquittal on the accessory to commit murder charge found that she lacked the specific intent that her mother be murdered, the Court must first determine, as best as such matters can be

determined, what the jury rationally concluded. A number of the petitioner's actions are not in dispute. These include that she wrote a number of letters to Coleman and made a number of diary entries during the summer of 1986. The trial court charged that the jury could consider the "various interpretations of the letters that have been put into evidence." 6/18/90 Tr. at 31 (accessory); 6/18/90 Tr. at 36 (conspiracy). One of these letters, State's Exh. R, was written after the plan between the petitioner and Coleman to stab her mother was abandoned. In that letter the petitioner wrote: "Remind me never to get my hopes up again about anything. I'm not going to be 'spyched' about anything that's promised in the future. I've had to (sic) much of that and promises are like water. One day you have a flood, the next, all the waters (sic) gone. Promises are very nice but I was taught never to promise anything unless I had an intention of carrying it out." Coleman testified that the promises to which the petitioner was referring involved their plan to kill her mother. The petitioner, on the other hand, testified that this plan referred to her running away. As noted above, the trial court instructed the jury that the letters were to be interpreted as reflecting on whether the petitioner had the specific intent that her mother be murdered. Thus the jury, faced with the fact that both Coleman and the petitioner admitted that this letter was written, had to decide whether it was evidence that the petitioner had the specific intent that her mother be murdered. The only rational conclusion that the Court can draw from the jury's acquittal of the petitioner on the charge of accessory to commit murder is that the jury concluded that this letter was not evidence that the petitioner had the specific intent that her mother be murdered at the time of the actual killing. Otherwise, the jury rationally would have been compelled to convict the petitioner on the

accessory count.

The petitioner also made several diary entries around the same time. See State's Exh. I and J. The diary entries also refer to the "plan" between the petitioner and Coleman. The petitioner testified that the plan referred to her running away from home and marrying Coleman and to his acting as her legal guardian. Coleman testified that the plan was to murder her mother. Thus again the jury was faced with the conflicting interpretation put forth by the petitioner's and Coleman's testimony. There is no question that the diary entries were made by the petitioner during the summer of 1986 and that they referred to a plan. The jury also was instructed that it was to consider the petitioner's testimony as reflecting on her intent. Once again, the only rational conclusion that the Court can draw from the jury's acquittal of the petitioner on the charge of accessory to commit murder is that the jury concluded that her diary entries were not evidence that the petitioner had the specific intent that her mother be murdered at the time of the actual killing. Otherwise, the jury rationally would have been compelled to convict the petitioner on the accessory count.

There is also no question that the petitioner and Coleman discussed, during the summer of 1986, ways in which they could murder her mother. These included the sandwich incident, the stabbing of her mother and claiming self-defense,[1] the flashing

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[1] Coleman testified that he and the petitioner had come up with a plan wherein the petitioner would stab her mother and then claim that she did it in self-defense because the mother's abuse of her would lend credence to that claim. The petitioner, however, decided that she could not go through with stabbing her mother herself and the Coleman would have to do it. As part of this later plan, the petitioner was to turn the living room lights in her house on and off and Coleman, who at the time lived in a house within sight of the

(continued...)

of the lights incident,[2] using chloroform, and cutting the brake lines on her car. Only the sandwich incident, the stabbing discussion, and the flashing of the lights incident were addressed in any depth during the petitioner's trial, and only the sandwich incident was referred to by the trial court in its instructions to the jury.

Concerning the sandwich incident, Coleman testified that the petitioner told him that she was going to put some sleeping

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[1](...continued)
petitioner's, would come over and kill her mother. The lights did flash, but Coleman did not attempt to carry out the plan. See Note 2 infra.

[2] The petitioner testified that she had been in trouble with her mother over her relationship with Coleman. The petitioner told Coleman about this and during their discussions, the petitioner testified, she and Coleman were "venting [their] angry feelings" and the subject of killing her mother came up. She testified that she said that she could never kill her mother and Coleman said that he could do it. The petitioner testified that she would have to give Coleman some kind of signal, like flashing the living room lights, and he could come over to the house and kill her mother. She further testified that they dismissed the idea as irrational. Later that day, however, after she had gone out and returned home with her mother, her mother accidently flashed the lights. The petitioner testified that she became scared that Coleman might come over and so she locked the kitchen door and drew the curtain so that "there was no way [Coleman] could get in." Coleman did not come over.

The petitioner testified that after this incident Coleman had written her a note in which he said that he saw the lights flash and thought that the petitioner wanted him to come to her house. The note also stated that Coleman became upset and told his father of the problems the petitioner was having with her mother and that he thought that the petitioner was angry because he did not come to her house after the lights flashed. After receiving this note the petitioner sent a note to Coleman in which she wrote that her "first reaction to [Coleman's] note was sheer anger. Being realistic, we both know we could never hurt my mom. I know I couldn't have stood by while someone else did." She also testified that she wanted to tell him that she was glad that he did not come over when the lights flashed and that she was hurt that he had misunderstood her. She also testified that the whole flashing of the lights incident was a miscommunication.

pills in her mother's sandwich. The petitioner, on the other hand, did not deny that she placed some drug in her mother's sandwich. There was some dispute, however, regarding whether these pills were sleeping pills or migraine headache medicine and whether it was two pills or an entire bottle or the remains of a bottle. The petitioner testified that she placed only two Fiorinal tablets in the sandwich and she did so only to calm her mother down. Jill Smith testified, however, that the petitioner told her that she placed the remainder of a bottle of sleeping pills in her mother's sandwich. The trial court instructed the jury on May 24, 1990, that the sandwich incident could not be used as a replacement act for the actual murder but that it could be used as evidence "to identify an intention to agree to cause the death on August 5th, 1987, or an intention to solicit, request, importune, intentionally -- or intentionally aid in the causing of the death on August 5th, 1987." Thus the jury was instructed that the sandwich incident could be used to determine the intent on both the conspiracy and accessory counts. In its instructions at the end of the case, however, the trial court stated only that the sandwich evidence "may be used, if you so find, to identify an intention to agree to cause the death on August 5th, 1987."[3]

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[3] When reviewing a cautionary instruction, like a supplemental charge, a court must view it in light of the trial court's charge to the jury as a whole. "To determine the correctness of a jury charge the charge must be 'read as a whole, and judged by its total effect rather than by its individual component parts.' Blanchette v. Barrett, 229 Conn. 256, 280, 640- A.2d 74 (1994)." Stewart v. Federated Department Stores, Inc., 234 Conn. 597, 606, 662 A.2d 753 (1995). A court cannot isolate the supplemental charge from the main charge. They must be read together. State v. Williams, 199 Conn. 30, 41, 505 A.2d 699 (1986). As noted above, the trial court instructed the jury at the time the sandwich incident was first introduced into evidence that it could be interpreted as bearing on the petitioner's intent with regard to the conspiracy

(continued...)

Although the jury could have rejected Coleman's and Smith's testimony concerning the contents of the bottle and the amount of the drug placed in her sandwich, because the petitioner admitted the salient facts surrounding this incident, the jury, in acquitting the petitioner on the charge of accessory to commit murder, rationally must have concluded that this incident was not evidence that the petitioner had the specific intent that her mother be murdered at the time of the actual killing. Otherwise, the jury rationally would have been compelled to convict the petitioner on the accessory count.

The information charged in count one is that the relevant time frame was between July 14, 1987 and August 5, 1987. It appears from the evidence that the discussions concerning murdering the petitioner's mother then ceased until after the petitioner returned from Woodstock, New York on July 14, 1987. The petitioner testified that her relationship with her mother improved as she spent more and more time with Alex Markov in Rowayton. Coleman testified that "towards the end of the third week of July, beginning of the fourth week of July [1987], talk about killing her mother came up again." Coleman testified that the petitioner told him that her mother was making her stay in Rowayton and continue her relationship with Alex and that she did not want to. He also testified that her mother was still putting pressure on the petitioner. Coleman testified that

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[3](...continued)
and accessory counts. Thus, without any indication that the trial court later instructed the jury that it could consider this evidence only on the petitioner's intent to agree to have her mother murdered, this incident was still before the jury during deliberations as bearing on her intent to request, solicit, importune, intentionally aid or, as the trial court instructed the jury, join with Coleman in the commission of the crime.

when the subject came up again, he "still didn't think it was a good idea. The situation was different at that time. My state of mind towards [the petitioner] was much more -- I was much more involved than her. I would do more of what she would ask me. In summer of '86, we had more of an equal relationship. At this point in time, she was the dominant person in the relationship ... so at this time I was less able to deny her."

On Friday, July 31, 1987, the petitioner left Glastonbury for Greenwich, to be followed by a trip to Binghamton, New York for a concert. Coleman testified that on the Tuesday night before the petitioner left on that trip, while speaking with her at her bedroom window, she again brought up the subject of having her mother killed. He testified that she was "crying on the other side of the glass when we were talking about it, and was demanding that it had to be done soon because she just couldn't stand it anymore." Coleman also testified that the petitioner told him that the murder "had to be done before she left on vacation, that she couldn't bear the thought of having to go on vacation with her mother and with the Markovs, and that [Coleman] had to do it before they left, which was that night." Coleman also testified that the petitioner called him from Greenwich the following night and asked him why he did not do it. He also testified that she asked him to feed her cats while she was away that weekend.

Coleman testified that during that first phone conversation with the petitioner on August 4, 1987, they had made a plan to kill her mother the following night, Wednesday, August 5, 1987. Coleman then testified that when he and the petitioner spoke in a telephone conversation later that evening she told him that she did not want to be at home when her mother was murdered and so they switched the plan to that night. He also testified that he had yet to speak with his friend, Chris Wheatley, to see if he was

going to help Coleman dispose of the body. Coleman testified further that during the 9:00 p.m. conversation he told the petitioner that Wheatley had agreed to help and that the petitioner told him that her mother was at home.

The petitioner testified concerning these same conversations that she told Coleman that she really did not want to go but that she had to and that this would be the last time she would have to stay with the Markovs. She also stated that Coleman said that he did not want her to go and that he did not know why her mother was making her go on the trip. The petitioner also testified that she lied to Coleman and did, in fact, want to go on the trip with the Markovs and that she did not want Coleman to think that she was voluntarily spending time with Alex because she knew Coleman was jealous. With regard to the phone call she made from Greenwich to Coleman on Friday night, she testified that she asked Coleman to feed her cats over the weekend. She denied any discussion concerning killing her mother during that conversation.

The petitioner testified that after she returned from Binghamton on August 4, 1987, she had four telephone conversations with Coleman and two or three conversations with her mother. Her first conversation with Coleman was at approximately 3:00 pm. that afternoon. She testified that she had called him to tell him that she had come back to Rowayton but that she was not going to be returning then to Glastonbury as she had expected but was instead staying in Rowayton. She also testified that she told him in that conversation that it was not necessary for him to feed the cats because her mother was going back to Glastonbury that day. When asked why she was not back in Glastonbury, the petitioner testified that she lied to Coleman, telling him that her mother was making her stay in Rowayton,

because she did not want Coleman to get mad at her. The petitioner also testified that in that first conversation when she told Coleman that she was not coming home he said "Oh, no, I left a note for you. I hope she doesn't find it." When the petitioner asked Coleman where he had left it and he said "[i]n your sheets," the petitioner said "[d]on't worry, she won't find it there." The petitioner testified that Coleman did not tell her the substance of that note.

The petitioner also testified that she spoke with her mother approximately one and one-half hours later and that her mother told her that the cats had torn the house apart and that the petitioner had cleaning work to do when she came home. The petitioner testified that she spoke with Coleman again after her conversation with her mother in which she expressed surprise that the house in Glastonbury was messed up by the cats because supposedly he had gone in there to feed them over the weekend. She also told him that her mother was picking her up at the end of the day and that she should be home later on that evening. The petitioner also testified that she had another conversation with her mother that day during which her mother told her that her friend Shannon Dubois had called and that she had spoken with her for approximately thirty minutes and that the petitioner should call her when she got home. Her mother also told her in that conversation that she had to finish the laundry when she came home that day.

The petitioner testified that she spoke with Coleman a third time that day but that she did not remember the substance of the conversation. The petitioner also testified that she spoke with Coleman on the telephone again when he called her that night at 9:00 p.m. During that conversation the petitioner told Coleman that she was coming back to Glastonbury the next day and that

Coleman was upset that her mother was making her stay in Rowayton and that he stated that he hated "that she's trying to come between us, and sometimes I just wish I could kill her." The petitioner testified that she did not think he was serious.

The petitioner agreed that she participated in all of the phone calls before and after the Binghamton trip and had conversations with Coleman outside her bedroom window before the trip. The petitioner, however, disputed the content of these conversations. The petitioner argues that since the jury acquitted her on the accessory to commit murder count, it necessarily must have concluded that she did not have the specific intent to cause her mother's murder.

The trial court instructed the jury to consider the following evidence as to count one:

> Besides the evidence you would be considering for the first element, you would consider for the second as well -- you should consider the testimony of Dennis Coleman that on Thursday before the defendant's trip to Rowayton, and then onto Binghamton, that at her window, crying, she begged him to kill her mother so she wouldn't have to go; that on August 4th, in a phone conversation, she said her mother would be coming home alone, and that she did not come home because she did not want to be present when the act of killing occurred, but would be -- would be by in the morning to clean up, and that after a phone call from her mother that she was tired and going to bed, she called Dennis back and told him she -- her mother was tired and going to bed; and the defendant's testimony that she lied to Dennis about not wanting to go to Binghamton, and that she was looking forward to it, and her relationship with her mother had improved, and she denied asking him to kill her mother.

Viewing the entire record in this case in a practical and

rational manner, as the Court must, and rejecting the hypertechnical and archaic approach to collateral estoppel, it is clear that the only rational interpretation of the acquittal on the accessory to commit murder charge is that the jury necessarily must have concluded that the petitioner did not have the specific intent to cause her mother's death. First, there were a number of conversations in the days leading up to the murder and a flurry of phone calls between the petitioner and Coleman on the day of the murder. Coleman testified that the petitioner begged him to kill her mother during the conversation before she left for Binghamton and that she was mad at him for not killing her before they left. He also testified concerning the petitioner's statements in their phone conversations on the day that she returned fro New York. Even assuming that the jury rejected Coleman's testimony concerning these events, however, there is no dispute that the petitioner told Coleman that her mother would be home on the night of the murder. Thus even if it found that she had not begged Coleman to murder her mother, the jury was left with the fact that the petitioner, during the flurry of phone calls between her and Coleman, specifically told him that her mother was home on the night of the murder. If she had done this one act alone, which she readily admits, with the specific intent that her mother be murdered, the jury rationally would be compelled to convict her.

It would be a hypertechnical application of the collateral estoppel doctrine if the Court were to conclude that the jury could have found, in the context of the entire record in this case, that even though the petitioner wanted to kill her mother, she did not tell Coleman that her mother was home on the night of the murder with the intention that her mother be killed. Such a conclusion would stretch the collateral estoppel doctrine beyond

its rational bounds. It also would be a hypertechnical application of the collateral estoppel doctrine, again, viewing the entire record of this case and the events leading up to the murder, to conclude that the jury could have found that the petitioner had the specific intent to murder her mother but that at the time that the petitioner told Coleman that her mother was at home alone, she did not know that this information would aid him in the commission of the murder. Setting this inquiry in the practical framework of this case, and viewed with an eye to all the circumstances of the proceedings, see Ashe, 397 U.S. at 444, the only rational interpretation of the verdict is that the jury necessarily must have concluded that the petitioner did not have the specific intent that her mother be murdered. Thus the Court finds that the jury must necessarily have concluded that the petitioner did not have the specific intent to cause her mother's death.

B. The Conspiracy Charge Claim[4]

The petitioner next claims that, even if the Court concludes that the jury could have found that the petitioner had the specific intent to cause her mother's murder, by adding a third element to the accessory charge, specifically, the word "join," the trial court collapsed the conspiracy charge into the accessory charge. Thus, the petitioner argues, because she was acquitted on the accessory count, even if the jury found that she had the specific intent that her mother be murdered, it necessarily found that she did not agree to "join" in a conspiracy with Coleman. To place the petitioner's claim in the proper context, it is necessary again to review the trial court's charge on both counts.

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[4] Even in light of the above conclusion, the Court will address the petitioner's remaining grounds for habeas corpus relief.

The trial court instructed the jury that instead of the two essential elements of the crime of accessory to commit murder, there were three elements. The trial court instructed the jury as follows:

> There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother.

The petitioner claims that the ordinary meaning of "join" is to agree and that the trial court, by adding the "join" element to the accessory instruction, negated the distinction between the conspiracy count and the accessory count and, in fact, collapsed the conspiracy charge into the accessory count.[5]

As an initial matter, the State's argument that "after the error was point out, the court subsequently reinstructed the jury at length on the elements of the statutes," see Memorandum in Opposition at 28, is unsupported by the record. The trial court, in fact, after the petitioner had placed her objections to the jury charge on the record, stated that "[t]here are 22 exceptions to the charge of the court. The court isn't going to go through each one. There is nothing in any one of them to warrant the court to give

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[5] The Connecticut Supreme Court reviewed the trial court's instruction on the accessory count and concluded that the trial court separated the "join" element from the accessorial liability element as it was charged in the accessory count. It found that, although the charge was incorrect, it did not weaken the State's burden on the accessorial liability charge.

further instructions." It was only after the jury had requested further instruction on the conspiracy count on June 20, 1987 that the trial court reinstructed the jury on the elements of accessory to commit murder and conspiracy to commit murder and, in doing so, did not explain that its earlier charge was in error or whether the new instructions were to be considered in the context of the court's charge as a whole.

"An erroneous statement in a charge to a jury may be cured by a later correct instruction which may be made when the jury is called back or returns for further instructions. Ziskin v. Confietto, 137 Conn. 629, 633, 79 A.2d 816; Hurburt v. Sherman, 116 Conn. 102, 107, 163 A. 603. This is particularly true where the court makes an immediate correction. Craney v. Donovan, 95 Conn. 482, 484, 111 A. 796. The corrected instruction must remove from the minds of the jury any erroneous impression. Maltbie, Conn. App. Proc. § 94. It has been held that a final and definite instruction cured earlier defective statements. Budovsky v. Hadhazi, 95 Conn. 388, 398, 111 A. 179." State v. Wright, 169 Conn. 256, 262, 362 A.2d 983 (1975). Here, after review of the trial court's original instruction and its supplemental instruction, it is far from conclusive that the supplemental instruction removed from the minds of the jury the erroneous impression. All the trial court stated when reviewing the elements in the supplemental charge was that it was "going to make it a little more simple ... [and that it was] going to break both statutes into two essential elements."

The trial court instructed the jury on the conspiracy count that the State must prove beyond a reasonable doubt three elements. The trial court stated that:

> First, there must be an agreement between the defendant and Dennis Coleman; secondly, the agreement must be entered into with the intent

> to cause the death of another person, and that, namely, is Joyce Aparo; and following -- and, three, following the agreement, there must be an overt act by any one of them to effect the object of the agreement.

The trial court, in expanding on the first element, charged the jury that

> "[i]t is not necessary for the State to show that the defendant knew all the conspirators or the entire agreement. It is enough if he knows he is -- or she knows she is joining with at least one other person in an agreement to cause -- to commit the crime." Id. at 36 (Emphasis added).

The trial court repeated that portion of the charge when it reinstructed the jury on conspiracy. Thus viewing the charge as a whole, it appears that the trial court's instruction did, in fact, collapse the distinction between the different counts. Although the charge was erroneous and the supplemental instruction failed adequately to correct the error, and although the trial court did collapse the distinction between the statutes, the question remains whether under this instruction the jury necessarily found that the petitioner did not intend to join in an agreement with Coleman to commit murder. After careful review of the trial court's cautionary instructions, original jury charge, and supplemental instructions, the Court finds that the jury did so find.

First, the trial court instructed the jury that it was to consider the same evidence on the conspiracy count as it did on the accessory count. As it specifically relates to the conspiracy count, the jury was instructed to consider, inter alia, the various interpretations of the letters and diary entries, and the nature and content of the phone calls between the petitioner and Coleman. Second, in view of the fact that the trial court specifically instructed the jury to consider the sandwich incident in regard to

the intent element of the accessory and conspiracy counts, and the Court has found nothing in the record to indicate that it later limited these instructions, and in view of the fact that the petitioner admitted all salient facts surrounding her conduct, the only rational conclusion is that the jury determined that the petitioner did not possess the intent to "join" with Coleman in the commission of the murder.[6]

II. THE 7-5 VOTE FOR ACQUITTAL

The petitioner next claims that because she had a statutory and constitutional right to be tried by a jury of six on the conspiracy count, and because she obtained at least six votes in favor of acquittal, a retrial on the conspiracy count is barred by both the Fifth Amendment Double Jeopardy Clause and the Fourteenth Amendment Due Process Clause. This claim is without merit.

As the Connecticut Supreme Court has held, a non-unanimous jury "cannot render any finding of fact." State v.

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[6] The Court notes that the trial court, in denying the petitioner's Motion to Dismiss, stated in its November 20, 1991 decision that "[i]n reviewing the court's instructions to the jury on the First Count, the court without question did not equate 'joining' with 'agreeing', an essential element of the conspiracy count. The law is clear that an agreement is not one of the elements of the crime of murder and therefore the jury's acquittal of the defendant on Count One was not a determination that there was no agreement between the defendant and Dennis Coleman to murder Joyce Aparo. This is also evidence by five members of the jury voting to convict the defendant on Count Two, thereby finding that the defendant did enter into an agreement with Dennis Coleman." 11/20/91 Mem. at 5. This conclusion begs the question. The Court cannot rely upon the five votes for conviction to support a finding that the petitioner possessed the intent to cause her mother to be murdered. As the Connecticut Supreme Court has held, a non-unanimous jury "cannot render any finding of fact." State v. Daniels, 207 Conn. 374, 388, 542 A.2d 306 (1988). The collateral estoppel analysis must focus on a valid and final judgment, not an inconclusive vote of the jury.

Daniels, 207 Conn. 374, 388, 542 A.2d 306 (1988). The seven votes in favor of acquittal thus are legally irrelevant.

CONCLUSION

For the reasons set forth above, the petition for Writ of Habeas Corpus is hereby GRANTED. This matter is hereby ORDERED remanded to the State of Connecticut Superior Court for the Judicial District of Hartford/New Britain at Hartford with directions to dismiss Count Two of the Information.

SO ORDERED.

Dated at Waterbury, Connecticut this 8th day of August 1997.

remand the case to the workers' compensation commissioner for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* KARIN APARO (14443)

PETERS, C. J., GLASS, COVELLO, BERDON and SANTANIELLO, Js.

The defendant appealed to this court from the trial court's denial of her motion to dismiss all charges pending against her. The defendant, who had been charged with the crimes of murder as an accessory and conspiracy to commit murder in connection with the killing of her mother by her then boyfriend, C, had been acquitted of the accessory charge but the twelve member jury could not reach a verdict on the conspiracy charge. *Held:*

1. There was no merit to the defendant's claim that, because she obtained at least six votes for acquittal on the conspiracy charge, and because that charge could have been tried by a jury of six, the double jeopardy clause of the fifth amendment barred a second prosecution for that crime; had the defendant preferred a jury of six for both charges she could have so elected, and because the jury did not come to any conclusion on the conspiracy charge, the vote tally had no legal significance.
2. Although collateral estoppel bars the state from relitigating a question of fact that has been determined by a partial verdict in the defendant's favor, retrial on the conspiracy charge was not precluded, under the circumstances here; the jury's conclusion that there was a reasonable doubt as to whether the defendant had solicited, requested, commanded, importuned, or intentionally aided C was not inconsistent with the conclusion that the defendant had entered into a conspiracy with C to commit murder.
3. The trial court, in denying the defendant's motion to dismiss, should not have determined that no evidence should be excluded on retrial; accordingly, on retrial, that court must exclude evidence offered in the first trial if it can be demonstrated that the jury, in acquitting the defendant on the accessory charge, harbored a reasonable doubt as to the truth of the fact sought to be proven and that the alleged fact, if proven, would establish an element of the offense of conspiracy and could, therefore, form the basis of a conviction on that count.

Argued June 2—decision released August 11, 1992

Motion to dismiss the second count of an information charging the defendant with the crime of con-

spiracy to commit murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Damiani, J.*; judgment denying the motion to dismiss, from which the defendant appealed. *Affirmed in part; reversed in part.*

Hope C. Seeley, with whom, on the brief, was *Hubert J. Santos,* for the appellant (defendant).

Judith Rossi, assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, and *James E. Thomas,* senior assistant state's attorney, for the appellee (state).

PETERS, C. J. The principal issue in this appeal is whether the principles of double jeopardy and collateral estoppel prohibit the state from retrying, on a charge of conspiracy to commit murder, a defendant who has been acquitted of a charge of accessory to murder. The defendant, Karin Aparo, was charged with one count of murder as an accessory in violation of General Statutes §§ 53a-54a (a)[1] and 53a-8,[2] and one count of con-

[1] General Statutes § 53a-54a provides: "MURDER. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

"(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

"(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony."

[2] General Statutes § 53a-8 provides: "CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission

spiracy to commit murder in violation of General Statutes §§ 53a-48 (a)[3] and 53a-54a (a). A jury acquitted her of the accessory charge but could not reach a verdict on the conspiracy charge. After the trial court declared a mistrial on the conspiracy count, the state announced its intention to retry the defendant on that count. The defendant filed a motion to dismiss all pending charges. Upon the trial court's denial of this motion, the defendant took an interlocutory appeal to the Appellate Court, which we transferred to ourselves pursuant to Practice Book § 4023 and General Statutes § 51-199 (c).[4] We affirm in part and reverse in part.

The defendant has raised three issues on appeal. She maintains that the trial court should have granted her motion to dismiss and barred her retrial for conspiracy because: (1) principles of double jeopardy preclude retrial when six out of twelve jurors vote for acquittal; (2) principles of collateral estoppel preclude retrial, because the jury necessarily found that she had never intended that her mother be killed; and (3) principles of collateral estoppel require the exclusion of certain

of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

[3] General Statutes § 53a-48 provides: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

"(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

[4] "Colorable claims of double jeopardy are an exception to the general rule that appeals in criminal cases must ordinarily await the final judgment that arises from imposition of sentence." *State* v. *Boyd*, 221 Conn. 685, 688 n.4, A.2d (1992); *Abney* v. *United States*, 431 U.S. 651, 659–62, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977).

evidence, leaving insufficient admissible evidence to warrant a retrial. We reject the first and second of these claims, and accept the third in part.

I

The defendant first claims that, because she obtained six votes for acquittal on the conspiracy count, and because that count could have been tried by a jury of six, the double jeopardy clause of the fifth amendment, which "serves to safeguard defendants in criminal proceedings against multiple punishments or repeated prosecutions for the same offense"; *State* v. *Aillon*, 182 Conn. 124, 127, 438 A.2d 30 (1980), cert. denied, 449 U.S. 1090, 101 S. Ct. 883, 66 L. Ed. 2d 817 (1981); protects her against a second prosecution.

On February 17, 1988, the defendant moved to sever the murder and conspiracy counts on the ground, inter alia, that she was entitled under General Statutes §§ 54-82b (c) and 54-82 (c) to a jury of twelve for the crime of murder and a jury of six for the crime of conspiracy. On April 26, 1990, she supplemented her motion by arguing in the alternative that, if the court denied the motion to sever the counts, two juries should be empaneled, one of twelve jurors for the murder count and one of six jurors for the conspiracy count. The motion was denied and an exception was taken.

The vote on the mistried conspiracy count was seven to five for acquittal. The defendant contends that, having secured at least six votes in her favor, she is protected by principles of double jeopardy from retrial. She claims that this is so, first, because she alleges that the trial court should have granted her request for a jury of six on the conspiracy count, and second, because the factual elements of the conspiracy count were resolved in her favor by six jurors, the same number she would have to persuade on retrial.

Section 54-82b (c) provides: "In any criminal trial by a jury, except as otherwise provided by law, such trial shall be by a jury of six." Section 54-82 (c) provides that "no person, charged with an offense which is punishable by death or life imprisonment, shall be tried by a jury of less than twelve without his consent." We do not read these provisions to require that separate juries be provided when only some of the charges against a defendant are punishable by death or life imprisonment. Had the legislature intended such an extraordinary measure, it would have explicitly provided for it. In this case, had the defendant preferred a jury of six, she could have so elected.

We decline the defendant's invitation to speculate that, had she consented to a trial before a jury of six, it would have consisted of six of the seven jurors who voted for acquittal. Because the jury did not come to any conclusion, the vote tally is legally irrelevant. "It is settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous. . . . A nonunanimous jury therefore cannot render any 'finding' of fact." *State* v. *Daniels*, 207 Conn. 374, 388, 542 A.2d 306 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989). This claim is therefore without merit.

II

Next, the defendant claims that collateral estoppel prevents the state from retrying her on the charge of conspiracy, because such a retrial would permit the state to relitigate issues necessarily decided in her favor in the first trial. Collateral estoppel is given constitutional dimensions by the double jeopardy clause. It is well established that retrial following a jury deadlock does not violate the constitutional provision against double jeopardy. *Aillon* v. *Manson*, 201 Conn. 675, 678, 519 A.2d 35 (1986); *State* v. *Aillon*, supra, 129–30.

We recently discussed in some detail the relationship between double jeopardy and collateral estoppel. In *State* v. *Hope*, 215 Conn. 570, 577 A.2d 1000 (1990), cert. denied, U.S. , 111 S. Ct. 968, 112 L. Ed. 2d 1054 (1991), we stated: "In a criminal case, collateral estoppel is a protection included in the fifth amendment guarantee against double jeopardy. *Ashe* v. *Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). ' "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' Id., 443. 'Collateral estoppel applies in two ways: (1) it may bar prosecution or argumentation of facts necessarily established in a prior proceeding; or (2) it may completely bar subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks. *United States* v. *Griggs*, 735 F.2d 1318 (11th Cir. 1984).' *United States* v. *DeMarco*, 791 F.2d 833, 836 (11th Cir. 1986).

"To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the government is attempting to relitigate those facts in the second proceeding. *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Irvin*, 787 F.2d 1506, 1515 (11th Cir. 1986). 'A defendant who argues that *Ashe* is applicable to his case carries the burden of establishing that the issue he seeks to foreclose from consideration in the second case was "necessarily" resolved in his favor in the prior proceeding. *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S. Ct. 745, 50 L. Ed. 2d 756 (1977).' *United States* v. *Castro*,

629 F.2d 456, 465 (7th Cir. 1980). Furthermore, when a defendant is acquitted of conspiracy and then retried on the substantive offense, 'if it can be determined that the first jury must have determined an ultimate fact common to the conspiracy and substantive crimes in the defendant's favor, acquittal of conspiracy may prevent the government from introducing the evidence necessary to convict the defendant of the substantive offense in a subsequent trial.' *United States* v. *Bollinger,* 796 F.2d 1394, 1406 (11th Cir. 1986).

" 'The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon* v. *United States,* 332 U.S. 575, 579 [68 S. Ct. 237, 98 L. Ed. 180 (1948)]. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.' *Ashe* v. *Swenson,* supra, 444." *State* v. *Hope,* supra, 584–85.

In *Hope,* the state sought to prosecute the defendant for aiding and abetting murder after the defendant had been acquitted of conspiracy to commit capital felony murder and the lesser included offense of conspiracy to commit murder. We held that the trial court should have granted the defendant's motion to dismiss,

because in the earlier prosecution the jury had necessarily determined that the defendant lacked the specific intent that the victim be murdered. Because that same intent would have been an element essential to the prosecution for aiding and abetting murder, the state was collaterally estopped from proceeding with that prosecution. Id., 588–89.

The defendant here claims that, as in *Hope,* issues that the state would have to prove at retrial were necessarily resolved in her favor by the jury in the first trial. To evaluate this claim we must decide, first, whether *Ashe* v. *Swenson,* supra, applies when a jury acquits on one count in a multicount indictment and does not reach a verdict on another count. *Ashe* v. *Swenson,* supra, 443, held that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the parties in any *future* lawsuit." (Emphasis added.) *Ashe* involved two successive proceedings against the defendant, whereas here jeopardy continues to attach from the first trial; see 3 W. LaFave & J. Israel, Criminal Procedure (1984) p. 75; and the jury could permissibly have returned inconsistent verdicts in the first trial. See *United States* v. *Powell,* 469 U.S. 57, 68–69, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). It may, therefore, be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues, it is arguable that the second trial is not a "future lawsuit" for *Ashe* purposes. The United States Supreme Court has not addressed this issue, and it is is a question of first impression for this court.

Courts that have considered the issue have held "with virtual unanimity" that collateral estoppel bars the state from relitigating a question of fact that was deter-

mined in the defendant's favor by a partial verdict. *United States* v. *Mespoulede,* 597 F.2d 329, 336 (2d Cir. 1979); see *United States* v. *Frazier,* 880 F.2d 878, 882–83 (6th Cir. 1989), cert. denied sub nom. *DeBusk* v. *United States,* 493 U.S. 1083, 110 S. Ct. 1142, 107 L. Ed. 2d 1046 (1990); *United States* v. *Mespoulede,* supra, 336–37 (citing cases). We are persuaded by the reasoning of those cases.

"We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it is supposed to represent. Occasional anomalies are the price of unanimity. . . .

"Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed . . . implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." (Citations omitted; internal quotation marks omitted.) *United States* v. *Mespoulede,* supra, 336–37.

We, therefore, reach the merits of the defendant's claim. In order to do so, we must examine the evidence that was presented to the jury that led it to acquit the defendant of the charge of aiding Dennis Coleman in the murder of her mother but to disagree on the charge of her conspiring with Coleman for the same purpose.

A

The defendant and Coleman gave contradictory testimony concerning the events leading up to the murder of the defendant's mother, Joyce Aparo. Coleman testified that the defendant, for more than a year preceding the murder, had repeatedly begged him to kill her mother, and that they had planned the murder together in detail the night before he did it. The defendant testified that she had never made any such request, and that she had not known that the murder would take place.

Coleman's testimony was as follows. In 1986 and 1987, the defendant lived with her mother in Glastonbury. In June, 1986, Coleman, then eighteen years old, met and began dating the defendant, who was fifteen years old. During the summer of 1986, the defendant and Coleman began a sexual relationship. At that time, they discussed the defendant's unhappiness with her life at home with her mother, with whom she had a painfully difficult relationship. At first they discussed a plan whereby the defendant would leave her mother and Coleman would become her guardian, but this plan was abandoned when they discovered that the defendant would have to be sixteen years old in order to select her own guardian. The defendant then initiated a discussion with Coleman about killing her mother.

These discussions continued throughout the summer of 1986. At one point, Coleman and the defendant discussed a plan whereby the defendant would stab her mother and then claim self-defense. This plan was aban-

doned when the defendant decided that she could not go through with stabbing her mother herself. They then decided that the defendant would flick the lights of her house as a signal for Coleman, who lived nearby, to come over and kill the victim. The lights did flash, but Coleman did not enter the house.

Coleman's testimony with respect to this incident was supported by a letter written to him by the defendant at that time stating that "[p]romises are very nice but I was taught never to promise anything unless I had an intention of carrying it out," that "I told you that you wouldn't be able to," that "I didn't ask you this time. You offered," and "Don't promise freedom when you don't have the keys to the cage. It's not fair!" Coleman testified that he had discussed this letter with the defendant and had assured her that he would keep his promise to her.

On a subsequent occasion, while Coleman was visiting the Aparo home, the defendant told him that she was going to put some sleeping pills into a sandwich that she was making for her mother. Coleman did nothing to stop her. Joyce Aparo took one bite of the sandwich, but decided that the relish was bad and sent them out to buy new relish.[5]

The evidence included other letters that Coleman and the defendant had written to each other during that summer. In one letter, Coleman stated "[a]ny sacrifice I will make," "[s]oon—for you—I will give my soul to something black," and "[y]ou know I would kill for you." The defendant wrote to Coleman: "I will do whatever is necessary. It is a decided thing and I will do it even if you won't help me. It is just another thing to do on my 'priority list' & right now it has a very high

[5] The jury was instructed that they could only use the evidence of the sandwich incident as evidence of intent, but that they could not substitute it for the acts with which the defendant was charged.

billing." In the same letter, she also wrote, "[l]eave the logistics to me unless you want to help," and "[m]y God, do you realize what we're thinking?" In the last of the letters from the summer of 1986 that were introduced into evidence, the defendant stated that she knew they could not follow through on their plan. "Being realistic we both know we could never hurt my mom. I know I couldn't have stood by while someone else did." Thereafter, the conversations about killing Joyce Aparo tapered off. The defendant and Coleman continued to see each other on an almost daily basis until the spring of 1987.

In early May, 1987, the defendant began spending the weekends at the Rowayton home of her violin teacher, Albert Markov. When Coleman became upset about the effect of her absences on their relationship, the defendant explained that she was trying to get away from her mother. She also told Coleman that she was in love with Alex Markov, her teacher's son. Later in May, she suggested to Coleman that they should stop communicating for a month, and he agreed. When they next spoke in late June, she told Coleman that she had had sexual relations with Alex Markov, but that her relationship with Markov had become platonic. From July 7 to 14, she traveled with Alex Markov to Woodstock, New York. While there, she spoke with Coleman several times by telephone. He then believed that the defendant's relationship with Alex Markov was platonic, but he was suspicious. Coleman testified that his relationship with the defendant during this time was "stressful."

After the defendant's return from Woodstock, discussions about killing Joyce Aparo resumed. The defendant told Coleman that her mother was forcing her to stay in Rowayton and to continue her relationship with Markov. Toward the end of July, she told Coleman that she, her mother, Albert Markov and Alex

Markov would shortly be traveling to Binghamton, New York for three or four days. Two times during the week before the trip, the defendant spoke to Coleman through her bedroom window. During the first of these conversations, the defendant cried and demanded that her mother be killed soon because she could not stand it any more. During the second conversation, the defendant said that it had to be done before the trip, because she could not bear the thought of having to go on vacation with her mother and the Markovs. They then discussed killing Joyce Aparo by holding a rag saturated with bleach and ammonia over her face or by strangling her. They agreed that Coleman would come into the house that night, kill the victim, and carry away the body, and that the defendant would clean up and wipe away fingerprints afterward. Coleman lost his nerve, however, and did not go through with his part of the plan. The next day, shortly before leaving for Binghamton, the defendant telephoned Coleman. At first she was upset that he had not carried out the plan, but then became "more understanding," and told him that she would be home on August 4. She asked him to go to the Aparo home, to let himself in with a key she had previously given to him, and to feed her cats, which he agreed to do. They agreed to carry out the murder plan on August 5. During one of the visits to feed the cats, Coleman put a note between the sheets of the defendant's bed stating, "I will do the deed."

On August 4, the defendant, who had returned from Binghamton and was staying in Rowayton, spoke four times by telephone with Coleman. She first told him to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it happened. In the third conversation, the defendant insisted

that the body be left where it could be found, so that the victim's life insurance would be paid to the defendant. During the last conversation, Coleman informed the defendant that a friend had agreed to help him.

At 1 a.m. on August 5, Coleman, accompanied by two friends, entered the Aparo home and strangled Joyce Aparo in her bed with a pair of pantyhose. Coleman and his two friends then took the body away in the victim's car, and abandoned the body and the car in Bernardston, Massachusetts.

Coleman's testimony was supported by that of two friends of the defendant. Shannon DuBois testified that on August 6, the defendant had told her that Coleman had committed the murder. The defendant had told DuBois that she and Coleman had discussed killing her mother on five different occasions, and that they had discussed a number of ways of committing the murder, including the use of chloroform, stabbing her mother, and cutting the brake lines of her mother's car. The defendant had also described the sandwich incident. The defendant had said that she had spoken with Coleman the night before the murder, and had not wanted to be there when it happened, but had planned to come back the next day, clean up the house, and call the police. Another friend, Jill Smith, testified that several months after the murder, the defendant had told Smith that Coleman had called her on the night of the murder, that he had been upset that she was not in Glastonbury, and that he had told her that he would kill her mother. The defendant had also told Smith that she had not thought that Coleman was serious, because on prior occasions he had said he would kill Joyce Aparo and had not followed through.

The state offered other evidence of actions by the defendant after Joyce Aparo's death that, it claimed, demonstrated her consciousness of guilt. Beverly

Warga, an administrative secretary at the police department, testified that on August 5, 1987, she had overheard a telephone conversation in which the defendant had asked, "Where did you do it? Did you hurt your head? Don't worry about it, I'll be there soon. I'll take care of you." Ann Marie Murray, who had been a coworker of Joyce Aparo's, testified that on August 6, 1987, the defendant had stated that she would be getting $300,000 from an insurance policy. There was evidence that the defendant had concealed evidence and had lied to the police about her knowledge that Coleman had committed the murder, and that she had had sexual relations with Coleman twice after he was arrested. On August 20, 1987, she wrote a letter to Coleman stating, "I really believe that we'll turn out O.K. Even if we both have to spend 25 years in jail."

The defendant, who testified on her own behalf, denied that she had requested or aided Coleman to kill her mother. She testified that her diary entries, which had been admitted into evidence and which stated that "Den & I have our plot" and "Update: Will not carry out plan," referred to her plan with Coleman to run away and get married. She testified that her "priority list" letter had also referred to her plan to run away.

She admitted that there had been a single actual discussion of killing her mother, and that this had led to the flicking of the lights incident. The discussion occurred after her mother had threatened to break up her relationship with Coleman, and she told Coleman that she wished her mother would die. He responded by suggesting that the defendant kill her mother and claim self-defense. When the defendant rejected this suggestion, he offered to do it himself by hiding in the house while they were away. The defendant then said that it would be better for him to be outside the house, and for her to signal him by flashing the lights. The idea was then dismissed as irrational. Later that day,

however, the defendant and her mother did go out, and when they returned, her mother accidentally flicked the lights off and on. This frightened the defendant, who locked the door and drew the curtains. The defendant acknowledged that two of her letters to Coleman had referred to this incident. She testified, however, that she had not intended to kill her mother.

The defendant admitted that, after one bitter argument after her mother had found a note discussing the defendant's plan to run away with Coleman, she had crushed two of her mother's Fiorinal tablets and put them in her mother's sandwich. Her intention, however, had been not to kill her mother, but only to calm her down.

After the defendant began spending time with Alex Markov in May, 1987, her relationship with her mother improved. During this same time, her relationship with Coleman began to dissolve, and after she began sleeping with Markov, she suggested to Coleman that they separate for a month so that she could work out her feelings. Several witnesses and her diary entries corroborated her testimony that her relationship with her mother had been improving during this time.

The defendant testified that she had lied to Coleman when she had said that she did not want to go to Binghamton and that her mother was forcing her to do so. She testified, and her diary indicated, that she had been looking forward to the trip and to going to parties with Markov. She had done this because she had not wanted Coleman to think that she "was voluntarily spending time with Alex" and because she "knew he was jealous."

In the August 4 telephone conversations, the defendant testified, she had not discussed killing her mother at all, but rather had telephoned Coleman to tell him that it would no longer be necessary for him to feed

the cats, because her mother had returned home. Coleman had been angry at her mother for making her stay in Rowayton and had said, "sometimes I just wish I could kill her."

In order to explain certain of her statements and actions, the defendant also presented evidence that she had been physically and emotionally abused by her mother. Numerous witnesses testified about the abuse, and reports were introduced that had been prepared by the Department of Children and Youth Services, which several times had investigated allegations of abuse, and by Norwalk Hospital, which had treated the defendant after a suicide attempt when she was twelve years old. Two psychiatrists, John Cegalis and Walter Borden, testified as expert witnesses on the defendant's behalf. Both opined that she fit the profile of an abused and battered child and suffered from post traumatic stress disorder. Cegalis testified that the defendant's expressions of desire for her mother's death did not indicate an intent to kill, but rather a fantasy that was normal in an abused child. Cegalis also said that the defendant's continuation of her relationship with Coleman, knowing that he had murdered her mother, was not abnormal for a battered child, because such children have a "morbid fear" of being rejected or abandoned. In light of her ambivalent feelings about her mother, Cegalis stated that "it would be understandable" for her to wish to hold onto, and even to try to protect, the one important person left in her life.

The defendant also presented evidence that Coleman had acted on his own in order to terminate the defendant's relationship with Markov, which Joyce Aparo had been encouraging. On cross-examination, Coleman admitted that he had been jealous of the defendant's relationships with other men, and that he had been depressed and upset as a consequence of her relationship with Markov. He testified that in late July, 1987,

when the defendant asked him what he would do if he knew that she and Markov had had sexual intercourse twenty times, "I told her that if that was true, I would drive off the road and kill us both." He said that on August 3, 1987, while he was in the Aparo home feeding the cats, he had become upset when he saw a pile of photographs of the defendant with Markov. He acknowledged that he had previously stated that he felt that it had been a situation of self-defense, in that it came down to Joyce Aparo or himself.

B

The defendant claims that the trial court improperly denied her motion to dismiss the conspiracy count on grounds of collateral estoppel. We do not agree.

In the present case, in order to acquit the defendant of being an accessory to murder, the jury would have had to find either that (1) she did not intend that her mother be killed, or (2) she did not solicit, request, command, importune, or intentionally aid Coleman to commit the murder, or (3) both.[6] On the other hand, in order

[6] The defendant, noting that the trial court, over her objection, instructed the jury that it had to find that "she intended to aid, assist *or join* Dennis Coleman in the commission of the murder of her mother," (emphasis added) claims that this instruction collapsed the distinction between the accessory and conspiracy statutes, so that acquittal of one necessarily implied acquittal of the other. The defendant argues that, because the ordinary meaning of "join" is "agree," and because agreement is the only element of conspiracy that will be an issue in the new trial (Joyce Aparo's death making the existence of an overt act indisputable), the jury necessarily found that the defendant did not conspire with Coleman.

Taken in context, however, the court's instruction does not support the defendant's argument. The court stated: "There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother." The defendant correctly noted that the third of these elements

for the jury on retrial to convict the defendant of conspiracy, "it must be shown that an agreement was made between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed. . . . Further, the prosecution must show both that the conspirators intended to agree and that they intended to commit the elements of the underlying offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Lewis*, 220 Conn. 602, 606–607, 600 A.2d 1330 (1991).

The defendant claims that, because it is undisputed that she aided Coleman by telling him that the victim was home alone, the verdict of acquittal demonstrates that the jury necessarily found that she did not have the intent to kill her mother. Since the state would have to prove such an intent in order to convict her of conspiracy, she contends, collateral estoppel bars a retrial on that charge. We do not agree.

"We have previously stated that a conviction under § 53a-8 requires proof of a dual intent, i.e., that the accessory have the intent to aid the principal and that in so aiding he intend to commit the offense with which he is charged." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Foster*, 202 Conn. 520, 525–26, 522 A.2d 277 (1987). Accessorial liability "is designed

was not in the statute. As given, however, this instruction clearly separates the question of the defendant's intent to join Coleman from that of whether she solicited, requested, commanded, importuned, or intentionally aided Coleman to commit the murder. The jury was not told that its resolution of the former question would answer the latter as well. On the contrary, the court stated that "if you find that the State has failed to prove any one of these elements to you beyond a reasonable doubt, you must find the defendant not guilty." The instruction, although incorrect, did not weaken the state's burden of proving accessorial acts and did not permit the jury to substitute a conspiracy for such acts.

to punish one who intentionally aids another in the commission of a crime and not one whose innocent acts in fact aid one who commits an offense." Id., 531.

Although the defendant concededly told Coleman that her mother was home on the night of the murder, the jury could reasonably have found, on the basis of either Coleman's or the defendant's testimony, that although she may have wanted to kill her mother, she did not make *this* statement with the intention that it result in her mother's death. According to the defendant, the reason she told Coleman that her mother was home was to indicate that it would no longer be necessary for him to go to the house to feed the cats. Coleman testified that the defendant had told him, during their first conversation on August 4, either that her mother was home alone or that her mother was coming home. At the time of that conversation, according to Coleman, the defendant's plan was for her mother to be killed the following night. By that time, the information that Joyce Aparo was home alone on August 4 would obviously have become too stale to be useful in the commission of the crime. Only in a later conversation did the defendant change the plan and ask him to kill her mother that night. Thus, even if the jury believed Coleman's account, it might have concluded that at the time the defendant told him her mother was or would be home alone, she did not know that this information would aid him in the commission of the murder. The aid would then have been analogous to the defendant's act in giving Coleman the key that he used to enter the house the night of the murder. Coleman testified on cross-examination that she had done this a number of months before, and had not done so for the purpose of helping him to kill her mother.

Given the numerous conflicts between the defendant's and Coleman's testimony, the jury could have chosen to disbelieve all or part of the latter. The jury might

reasonably have concluded that Coleman was untrustworthy because he was jealous of the defendant's relationships with other men and was angry at the defendant for his present predicament, and because he desired to shorten his prison sentence by currying favor with the authorities. The jury therefore might, for example, have decided to believe only those portions of his testimony that were corroborated by DuBois and Smith, both of whom testified that the defendant had admitted discussing the murder with Coleman shortly before he killed Joyce Aparo, but neither of whom testified that the defendant had requested Coleman to do so. Mere knowledge that a crime is going to be committed is not sufficient to establish liability as an accessory if the defendant does not encourage or intentionally aid in the commission of the crime. See *State* v. *Wakefield*, 88 Conn. 164, 172–73, 90 A. 230 (1914). The jury's conclusion that there was a reasonable doubt as to whether the defendant had solicited, requested, commanded, importuned, or intentionally aided Coleman would, therefore, not be inconsistent with the conclusion that the defendant had entered into a conspiracy to commit murder.[7] We conclude, therefore, that the principle of collateral estoppel does not bar the state from retrying the defendant for conspiracy to commit murder.

C

Finally, the defendant claims that much of the evidence that the state relied upon in the first case must be excluded from a retrial on the basis of collateral estoppel, and that the evidence that remains is insufficient to justify placing her on trial a second time, at least in the adult division of Superior Court. Specifi-

[7] The question of whether the evidence was sufficient to support a conviction for conspiracy has not been briefed or argued, and nothing in this opinion should be understood to prejudge this issue, which is likely to arise again on retrial.

cally, the defendant claims that the acquittal on the charge of being an accessory to murder shows that the jury necessarily disbelieved all the state's evidence regarding her activities and her state of mind from July 14 to August 5, 1987, the period during which the information charged that she had been an accessory. Therefore, she contends, the state may introduce into evidence only the conversations she had with Coleman during the summer of 1986, when she was fifteen years old.[8] She further asserts that General Statutes § 46b-121 assigns to the Juvenile Matters of the Family Division of the Superior Court exclusive original jurisdiction over children under sixteen years of age who commit delinquent acts, and that the information therefore must be dismissed for lack of jurisdiction or, in the alternative, that the case should be transferred to the Juvenile Matters docket.

This argument fails at its first juncture. As we have already noted, the defendant's acquittal on the charge of being an accessory to murder does not necessarily indicate that the jury disbelieved all of the state's evidence of her conduct after she turned sixteen years old. On the contrary, the jury could have reached the result it did if it believed every piece of that evidence except those parts of Coleman's testimony that directly indicated that the defendant had solicited, requested, commanded, importuned, or intentionally aided him in the murder of Joyce Aparo.

The trial court, however, rejected all of the defendant's collateral estoppel claims and refused to limit in any way the evidence that the state could introduce at the second trial. "[T]he state is not barred from putting Dennis Coleman or any other witness who testified in the first trial on the witness stand in the second trial. An acquittal on the First Count does not neces-

[8] The defendant turned sixteen on February 12, 1987.

sarily mean that the jury rejected any witness' testimony in toto." We agree with the last sentence just quoted, but disagree with the conclusion that Coleman's testimony will, therefore, be admissible in its entirety.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson,* supra, 443. "In a criminal context, the doctrine prohibits the government from forcing a defendant to defend against charges or allegations which he overcame in an earlier trial." *United States* v. *Gornto,* 792 F.2d 1028, 1031 (11th Cir. 1986). "For estoppel to apply, the fact sought to be foreclosed by [the] defendant must necessarily have been determined in his favor in the prior trial; it is not enough that the fact *may* have been determined in the former trial." (Emphasis in original.) *United States* v. *Irvin,* supra, 1515. The defendant has the burden of showing "that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States,* 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990); see id., 350–51.

The state maintains that *Dowling* v. *United States,* supra, establishes that a prior acquittal does not automatically preclude the state from using evidence presented in the first trial. *Dowling* held that, under the facts there presented, collateral estoppel did not bar the introduction of evidence of a crime that the defendant had previously been acquitted of committing. Dowling was first tried and acquitted for robbery A. Thereafter, he was prosecuted for robbery B, which (unlike the two robberies for which the defendant was successively tried in *Ashe* v. *Swenson,* supra) occurred at a different time and place. In that trial, evidence of his conduct in committing robbery A was offered to prove his identity as the perpetrator of robbery B: in

both robberies, the perpetrator had worn a ski mask, had carried a small pistol, and had been accompanied by a man named Delroy Christian. The court held that this did not constitute double jeopardy, noting that, "unlike the situation in *Ashe* v. *Swenson,* the prior acquittal did not determine an ultimate issue in the present case." *Dowling* v. *United States,* supra, 348. The court noted that, under the relevant rule of evidence, a similar act by the defendant is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Id. Because the second trial did not require the state to prove Dowling's participation in robbery A beyond a reasonable doubt, the doctrine of collateral estoppel was inapplicable. Id., 348–50. Moreover, an examination of the record revealed that the acquittal did not necessarily represent a jury determination that the defendant had not been one of the masked men who had participated in robbery A. Id., 350–52.

Whether it is *Ashe* or *Dowling* that controls the admissibility of evidence in a case such as this depends on whether, as a general matter, the prosecution on retrial "may constitutionally rely on the same evidence or even the same theory relied upon in a former proceeding as long as the prosecution also presents an alternative—some other evidence or theory—on which the jury may base its verdict." A. Poulin, "Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal," 58 U. Cin. L. Rev. 1, 12 (1989) (hereinafter "Collateral Estoppel"). The answer to that question depends on how the line is drawn between proof of ultimate facts and proof of predicate or evidentiary facts. Evidence of predicate facts, rather than ultimate facts, need not be proven beyond a reasonable doubt; *State* v. *Williams,* 220 Conn. 385, 398, 599 A.2d 1053 (1991); and is, therefore, not barred by collateral estoppel.

Where evidence of a crime of which the defendant has previously been acquitted is sufficient, but not necessary, to prove an ultimate fact in a later trial, it is in theory possible for the jury to use that evidence only to cast light on other facts not previously litigated, and to use those other facts as the primary basis of conviction. In that case, the crime previously tried would only be a predicate fact.[9] It is, however, equally possible that the second jury will convict the defendant solely on the basis of conduct that the first jury had found not to be proven beyond a reasonable doubt.[10] In such cases, "the close relationship between the charged offense and the acquitted offense creates a risk that

[9] If all proof of ultimate facts could thus be transformed by hypothesis into proof of evidentiary facts, then the doctrine of collateral estoppel would be inapplicable in any case in which a retrial was permissible, and thus would never act to bar evidence. See A. Poulin, "Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal," 58 U. Cin. L. Rev. 1, 8–9 (1989). *Dowling* v. *United States*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), does not suggest, however, that the court intended to discard the well established rule that collateral estoppel may exclude evidence in certain cases; see id., passim; annot., "Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of that Offense," 25 A.L.R.4th 934 (1983 & Sup. 1991); and courts have continued to apply that rule after *Dowling*. See, e.g., *United States* v. *Seley*, 957 F.2d 717, 722 (9th Cir. 1992); *United States* v. *Blackwell*, 900 F.2d 742, 745–46 (4th Cir. 1990); *Maryland* v. *Baxter*, 92 Md. App. 213, 607 A.2d 120 (1992); *Eatherton* v. *Wyoming*, 810 P.2d 93 (Wyo. 1991).

[10] No jury charge can be crafted that would permit the jury to use the challenged evidence for the permissible purpose while preventing the jury from using it for the impermissible purpose. Even the best intentioned jury probably could not follow such an instruction. Ordinary experience teaches us that once a person has arrived at a belief, that person will often be hard put to say which evidence was determinative in forming that belief and which evidence was merely helpful. Once the evidence is admitted, therefore, a risk exists, which court and jury alike are powerless to prevent, that the defendant's constitutional rights will be violated. We note that limiting instructions have been held to be inadequate where the jury has heard and been told to disregard compelling evidence of the defendant's guilt that was constitutionally inadmissible. See, e.g., *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (codefendant's confession admitted only against codefendant); *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (allegedly involuntary confession).

the jury will convict the defendant because the jury concludes beyond a reasonable doubt that the defendant committed the criminal conduct of which the prior jury acquitted the defendant. Collateral estoppel should protect the defendant against that risk . . . ." A. Poulin, "Collateral Estoppel," supra, 23. We conclude that evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it "would establish an element of the charged offense and could therefore form the basis of the conviction . . . ." A. Poulin, "Collateral Estoppel," supra, 33; see *Maryland* v. *Baxter,* 92 Md. App. 213, 607 A.2d 120, 123 (1992); *Eatherton* v. *Wyoming,* 810 P.2d 93, 103–104 (Wyo. 1991).

In the case now before us, at least some of the evidence that, if believed, would have established the defendant's guilt of being an accessory to murder, would also have established that, intending that the crime of murder be performed, she entered into a conspiracy with Coleman. "In *Dowling,* the prior crime evidence was relevant to an essential element but would not itself, if proved, establish that essential element." A. Poulin, "Double Jeopardy: *Grady* and *Dowling* Stir the Muddy Waters," 43 Rutgers L. Rev. 889, 906 (1991). In this case, however, like *Ashe* and unlike *Dowling,* the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill. For example, Coleman testified that during the August 4 telephone conversations, the defendant first told him to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it hap-

pened. Assuming, as we are required to do, that the jury complied with the court's instructions, its acquittal on the accessory charge requires the conclusion that it found that these alleged facts had not been proven beyond a reasonable doubt.[11] "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [the defendant had made those statements], the State could not present the same or different . . . evidence in a second prosecution . . . in the hope that a different jury might find that evidence more convincing." *Ashe* v. *Swenson*, supra, 446.

The trial court's conclusion that no evidence should be excluded must, therefore, be reconsidered in light of the test we have articulated today. That test clearly indicates that the state may not introduce Coleman's testimony that the defendant requested, on the night before the murder took place, that Coleman kill her mother. The jury in the first trial demonstrably harbored a reasonable doubt as to the truth of that alleged fact and, if that fact were found to be proven beyond a reasonable doubt by the jury in the second trial, it would establish an element of the charged offense of conspiracy and could, therefore, form the basis of a conviction. With respect to other facts that the state may seek to prove, it would not be appropriate, on the present record, for us to anticipate evidentiary rulings on retrial. The trial court must exclude evidence offered in the first trial if (1) it can be demonstrated that the jury, in acquitting the defendant of the accessory count

[11] The state, noting that accessorial liability is in most cases based on physical acts, contends that the jury may have believed Coleman, "but nevertheless concluded that the defendant's verbal acts did not rise to the level of accessorial liability needed for conviction of murder." Inasmuch as four of the five accessorial acts specified in General Statutes § 53a-8—soliciting, requesting, commanding, or importuning—are necessarily verbal acts, we think that the jury could not have reached such a conclusion without disobeying its instructions and nullifying the statute.

in the first trial, harbored a reasonable doubt as to the truth of the fact sought to be proven, and (2) the alleged fact, if proven, would establish an element of the offense of conspiracy and could, therefore, form the basis of a conviction on that count.

The decision of the trial court is affirmed in part and reversed in part, and the case is remanded to the trial court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

GREGORY WALKER *v.* COMMISSIONER OF CORRECTION (14339)

PETERS, C. J., CALLAHAN, COVELLO, BORDEN and BERDON, Js.

The plaintiff in error, W, who had been convicted of the crime of murder, sought a writ of habeas corpus claiming that he had been denied the effective assistance of appellate counsel because counsel had failed to appeal the issue of whether the trial court's instruction on circumstantial evidence diluted the state's burden of proof. The habeas court dismissed the petition concluding that, if raised, the issue would not have been successful because, in light of the trial court's entire charge, it was not likely that the jury was misled. After the habeas court denied W's petition for certification to appeal, W brought a writ of error. *Held* that the trial court did not abuse its discretion in denying the petition for certification to appeal; as determined by this court in *State* v. *Bunkley* (222 Conn. 444) with respect to a claim of ineffective assistance of appellate counsel in a habeas proceeding, the allegedly improper charge had to be examined, not in isolation, but in the context of the entire charge.

Neither counsel having raised or briefed the issue of whether this court had subject matter jurisdiction to consider the writ of error, this court assumed that it had jurisdiction.

(One justice dissenting)

Argued June 9—decision released August 11, 1992

Writ of error from the decision of the Superior Court in the judicial district of Tolland, *Scheinblum, J.*, denying the plaintiff in error's petition for certification to appeal from the dismissal of his petition for a writ of habeas corpus. *Affirmed.*